

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

75-7423

To Be Argued by
ROBERT P. KNAPP, JR.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B PLS

MARY ANNE GUITAR,

Plaintiff-Appellant,

-against-

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE
BROADCASTING CO., INC. (Del.), H. PAUL JEFFERS,
ROBERT MARTIN CORPORATION, ROBERT WEINBERG,
MARTIN BERGER, JOHN YOTTES, MARGARET MIGLIORE
SCHNEIDER and GERALD DAVID LLOYD,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT MARY ANNE GUITAR

WINDELS & MARX
Attorneys for Plaintiff-Appellant
51 West 51st Street
New York, New York 10019
(212) 977-9600

Robert P. Knapp, Jr.,
J. Dennis McGrath,
Of Counsel

(5021B)

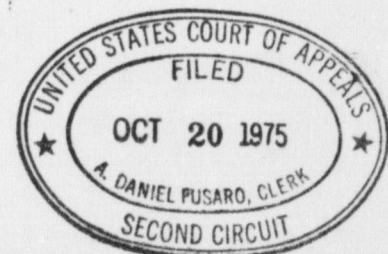


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES AND AUTHORITIES	11
STATEMENT OF THE CASE	1
THE ISSUES	2
FACTS	4
<u>Summary of the Case</u>	4
<u>The Libels</u>	6
<u>The Parties</u>	11
CHRONOLOGY	14
<u>Facts Developed</u>	16
<u>Yottes</u>	27
<u>Jeffers</u>	28
<u>Summary of the Salient Facts</u>	34
ARGUMENT	37
POINT I. The Evidence Demonstrates that the WINS Broadcast and the Mar- tin Leaflet were False, Defama- tory and Malicious.	37
POINT II. Fair Comment and Constitutional Privilege Have No Place in This Case.	50
POINT III. There is No Basis in the Record for Granting Defendants Summary Judgment.	53
POINT IV. Defamation By Conspiracy To Vio- late Title 47 U.S.C. §§ 317, 501, 502, 503 and 508 Gives Rise to A Civil Cause of Action Under the Laws of the United States.	62
CONCLUSION	70

<u>TABLE OF CASES</u>	<u>Page</u>
<u>Ackerman v. Columbia Broadcasting System, Inc.</u> , 301 F.Supp. 628 (S.D.N.Y. 1969)	68
<u>Adickes v. S. H. Kress and Company</u> , 398 U.S. 144 (1970)	55
<u>Allioto v. Cowles Communications, Inc.</u> , 519 F.2d 777 (9th Cir. 1975)	61
<u>Al Raschid v. News Syndicate Co.</u> , 265 N.Y. 1 (1934)	47
<u>Bell v. Hood</u> , 327 U.S. 678 (1946)	65, 66
<u>Ben-Oliel v. Press Publishing Co.</u> , 251 N.Y. 250, 256 (1929)	43, 44, 47, 49
<u>Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics</u> , 403 U.S. 388 (1971)	64
<u>Board of Commissioners of Jackson County, Kansas v. United States</u> , 308 U.S. 343 (1939)	65
<u>Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers, Inc.</u> , 260 N.Y. 106 (1932)	50, 51
<u>Cantrell v. Forest City Publishing Co.</u> , 419 U.S. 245, 42 L.Ed. 419 (1974)	52
<u>Carroll v. Paramount Pictures, Inc.</u> , 3 F.R.D. 95 (S.D.N.Y. 1942)	49
<u>Clevenger v. Baker Voorhis & Co.</u> , 10 A.D.2d 365 (1st Dept. 1960)	46
<u>Clevenger v. Baker Voorhis & Co.</u> , 8 N.Y. 2d 187, 203 NYS2d 812 (1960)	47

TABLE OF CASES (contd.)

	<u>Page</u>
<u>Conqueror, The</u> , 166 U.S. 110 (1896)	55
<u>Continental Ore Co. v. Union Carbide & Carbon Corp.</u> , 370 U.S. 698 (1962)	57
<u>Cooper v. Stone</u> , 24 Wend. 434 (N.Y. Sup. Ct. of Judicature, 1840)	48
<u>Corrigan v. Bobbs-Merrill Co.</u> , 228 N.Y. 58 (1920)	53
<u>Daly v. West Central Broadcasting Co.</u> , 201 F.Supp. 238 (S.D. Ill. 1962)	69
<u>d'Altomonte v. New York Herald Co.</u> , 154 App. Div. 453, 139 N.Y.S. 200 (1st Dep't), modified without opinion, 208 N.Y. 596 (1913)	45, 47
<u>Davis v. Hearst</u> , 160 Cal. 143, 116 P.530 (1911)	70
<u>Deitrick v. Greaney</u> , 309 U.S. 190 (1940)	65
<u>De Sylva v. Ballentine</u> , 351 U.S. 570 (1956)	62
<u>Dulberg v. Mock</u> , 1 N.Y. 2d, 54 (1956)	47
<u>Felix v. Westinghouse Radio Station, Inc.</u> , 186 F.2d 1 (3rd Cir. 1950)	62
<u>Fitzgerald v. Pan American World Airways</u> , 229 F2d 499 (2d Cir., 1956)	66
<u>Gertz v. Robert Welch, Inc.</u> , 418 U.S. 323 (1974)	51
<u>Goldwater v. Ginzburg</u> , 261 F. Supp. 784 (S.D.N.Y. 1966), aff'd, 414 F. 2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970)	60

<u>TABLE OF CASES (cont.)</u>	<u>Page</u>
<u>Gordon v. National Broadcasting Co.</u> , 287 F.Supp. 452 (S.D.N.Y. 1968)	68
<u>Guam Federation of Teachers v. Ysrael</u> , 492 F.2d 438 (9th Cir. 1974)	61
<u>Hoeppner v. Dunkirk Printing Co.</u> , (Case No. 1) 227 App. Div. 130 (4th Dept. 1929) affirmed 254 N.Y. 95	49
<u>Holm v. Holm</u> , 146 App. Div. 75 (1st Dept. 1911)	46, 49
<u>Hurley v. Northwest Publications, Inc.</u> , 273 F.Supp. 967, (D. Minn. 1967), aff'd on opinion below, 398 F.2d 346 (8th Cir. 1968)	59
<u>Ivy Broadcasting v. American Telephone & Telegraph Co.</u> , 391 F.2d 486 (2d Cir. 1968)	62
<u>J. I. Case Co. v. Borak</u> , 377 U.S. 426 (1964)	64
<u>Jobson v. Henne</u> , 355 F.2d 129 (2d Cir. (1966)	60
<u>Keviczky v. Lorber</u> , 290 N.Y. 297 (1943)	57
<u>Kleeberg v. Sipser</u> , 265 N.Y. 87 (1934)	49
<u>Konigsberg v. Time, Inc.</u> , 312 F.Supp. 848 (S.D.N.Y. 1970)	59
<u>Levey v. Brooklyn Union Publishing Co.</u> , 65 Misc. 373 (Sup. Ct. N.Y.Co 1909), aff'd, 137 App. Div. 947, (1st Dept. 1910), aff'd, 202 N.Y. 555 (1911)	53
<u>McKee v. Robert</u> , 197 App. Div. 842 (3rd Dept. 1921)	53
<u>Mencher v. Chesley</u> , 297 N.Y. 94,99 (1947)	38
<u>New York Times v. Sullivan</u> , 376 U.S. 254 (1964)	52
<u>Perkins v. Standard Oil Co.</u> , 395 U.S. 642 (1969)	57
<u>Poller v. Columbia Broadcasting System</u> , 368 U.S. 464 (1962)	55

TABLE OF CASES (contd.)

	<u>Page</u>
<u>Reitmeister v. Reitmeister</u> , 162 F.2d 691 (2d Cir. 1947)	62, 66, 67
<u>Sanderson v. Caldwell</u> , 45 N.Y. 398 (1871)	45, 48
<u>Sartor v Arkansas Natural Gas Corporation</u> , 321 U.S. 620 (1944)	55
<u>Scripps-Howard Radio, Inc. v. FCC</u> , 316 U.S. 4 (1942)	68
<u>Smith v. Kansas City Title & Trust Co.</u> , 255 U.S. 180 (1921)	62
<u>Sola Electric Co v. Jefferson Electric Co.</u> , 317 U.S. 173 (1942)	65
<u>Sonnentheil v Christian Moerlein Brewing Co.</u> , 172 U.S. 401 (1898)	55
<u>Spring Co. v. Edgar</u> , 99 U.S. 645 (1878)	55
<u>Sullivan v. Daily Mirror, Inc.</u> , 232 App. Div. 507 (1st Dept. 1931)	49
<u>Tennant v. Peoria & Pekin Union R. Co.</u> , 321 U.S. 29 (1943)	58
<u>Thompson v. Evening Star Newspaper Co.</u> , 394 F.2d 774 (D.C. Cir.), cert. denied, 393 U.S. 884 (1968)	59
<u>Thorley v. Lord Kerry</u> , 4 Taunt. 355	53
<u>Trails West, Inc. v. Wolff</u> , 32 N.Y. 2d 207 (1973)	60
<u>Triggs v. Sun Printing and Publishing Assn.</u> , 179 N.Y. 144 (1904)	37, 45, 46 49

TABLE OF CASES (contd.)

	<u>Page</u>
<u>Tunstall v. Brotherhood of Locomotive Firemen & Enginemen</u> , 323 U.S. 210, 213 (1944)	65, 66, 67
<u>United States v. Diebold, Incorporated</u> , 369 U.S. 654 (1962)	58, 60
<u>United States v. Perma Paving Co., Inc.</u> , 332 F.2d 754 (2d Cir., 1964)	68
<u>Valentine v. Chrestensen</u> , 316 U.S. 52, 54 (1942)	53
<u>Wallis v. Pan-American Petroleum Corporation</u> , 384 U.S. 63 (1966)	67
<u>Weiss v. Los Angeles Broadcasting Co., Inc.</u> , 163 F.2d 313 (9th Cir. 1947)	62, 69
<u>White Motor Company v. United States</u> , 372 U.S. 253 (1963)	55
<u>Wyandotte Transportation v. United States</u> , 389 U.S. 191 (1967)	67

TABLE OF STATUTES

Communications Act of 1934, 47 U.S.C.	
151 et seq.	67
Section 317	62, 63, 69, 70
Section 501	62, 63
Section 502	62
Section 503	62, 63
Section 508	62, 63
Railway Labor Act, 49 U.S.C.	
Section 484	66
Section 484(b)	66
Section 622(a)	66
28 U.S.C. Section 1331	65, 66, 67

TABLE OF RULES AND REGULATIONS

	<u>Page</u>
Federal Rules of Civil Procedure	
Rule 56(e)	59
Federal Rules of Evidence	
Rule 1002	58

TABLE OF OTHER AUTHORITIES

Code of Federal Regulations	
47 C.F.R. Section 73.119	62
House Report No. 1258, 86th Congress, 2d Session, 1960	63
<u>Restatement of Torts</u>	
Section 606 (1)(c)	50, 51, 52, 53
<u>Richardson on Evidence</u> (10th Ed.) (1973) 579, §570	58
<u>Webster's Seventh New Collegiate Dictionary</u> 410 (1961)	38
1960 <u>U.S. Code Congressional & Administrative News</u> 3523, 3525-6	63

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

DOCKET NO. 75-7423

MARY ANNE GUITAR,

Plaintiff-Appellant,

-against-

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE BROADCASTING CO., INC. (DEL.), H. PAUL JEFFERS, ROBERT MARTIN CORPORATION, ROBERT WEINBERG, MARTIN BERGER, JOHN YOTTES, MARGARET MIGLIORE SCHNEIDER and GERALD DAVID LLOYD,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT MARY ANNE GUITAR

STATEMENT OF THE CASE

This jury case was commenced in the United States District Court for the Southern District of New York, Honorable Robert L. Carter, District Judge on January 9, 1973 with the filing of a complaint against the defendants Westinghouse Electric Corporation ("Electric"), Westinghouse Broadcasting Co., Inc. (Indiana) ("Broadcasting"), Jeffers, Robert Martin Corporation ("Martin"), Weinberg and Berger. On February 15, 1973 an amended complaint added Yottes as a defendant. A second amended complaint was filed on June 15, 1973 substituting

Broadcasting (Delaware) for Broadcasting (Indiana). With the exceptions of the changes in parties and allegations relating only to Yottes, the original and the two amended complaints were identical.

On December 12, 1973, a separate action was commenced against the defendants Lloyd and Migliore, again on a complaint containing the same allegations as in the prior action. On April 15, 1974, the court ordered the two actions consolidated. The defendants moved separately for summary judgment on October 4, 1974. Their motions were granted by Judge Carter on June 17, 1975. 396 F. Supp. 1042. The plaintiff appeals.

THE ISSUES

1. On a motion by defendants for summary judgment must all permissible inferences be drawn in the plaintiff's favor and all questions of credibility resolved on her behalf?

2. In granting summary judgment to defendants, did the court below properly hold that there was no triable issue of fact on a material matter as to which defendants' sole evidence is inadmissible under the best evidence rule?

3. In granting summary judgment to defendants, did the court below properly hold there was no triable issue of fact as to material matters on which the defendants' own deposition testimony is contradictory?

4. In granting summary judgment to defendants, did the court below properly hold there was no triable issue as to any material fact where the defendants' own deposition testimony contains contradictions, evasions and inconsistencies that would

enable a jury to find against the defendants on the principle of falsus in uno, falsus in omnibus?

5. Where motive is a critical factor in a jury's arriving at a determination of fact, should summary judgment be granted?

6. Is a statement that purports to set forth the content and subject matter of a book a statement of fact or of opinion?

7. Does the doctrine of fair comment apply to knowingly false and defamatory utterances presented as statements of fact, not of opinion?

8. Do fair comment and constitutional privilege apply to a false and defamatory publication presented as a book review which is in fact a corruptly procured personal attack on the plaintiff?

9. Does the Federal Communications Act give a right of action to a private party injured by a radio broadcast in the form of a book review which in fact is a personal attack that has been corruptly procured by one who seeks pecuniary gain therefrom?

FACTS

Summary of the Case

This jury case is an action for libel and violation of the Federal Communications Act. The plaintiff appeals from summary judgment for defendants.

The plaintiff, a free-lance writer on the environment, alleges that the defendant Robert Martin Corporation ("Martin"), a real estate developer, conspired with the defendants Yottes, Jeffers, and others, corruptly inducing Jeffers to broadcast over "All-News" radio station WINS a defamatory personal attack on the plaintiff in the guise of a "book review." This was done, the plaintiff asserts, to enable Martin to discredit her by publishing a purported "transcript" of the fraudulent "review" in a printed leaflet.

At the time of Jeffers' broadcast "review" on December 17, 1972 plaintiff's "summer" book, published in June 1972, was more than six months old and not news within WINS' constantly proclaimed slogan, "All News All the Time." However, on December 13, just four days before Jeffers' broadcast his "review," the plaintiff as an environmentalist had addressed a citizens' group opposed to Martin's plan to rezone a large open space tract. Allegedly to handle "public relations" for the rezoning Martin hired defendant Yottes. For 19 months previously, Yottes had worked off and on at WINS in a so-called "casual" capacity as a fellow employee of defendant Jeffers. Yottes remained on WINS "casual" list through the time of the defamations, return-

ing soon thereafter to active employment with the station. It was through Yottes, says the plaintiff, that Martin "planted" the WINS review with Jeffers.

Just three days after December 17, when Jeffers broadcast his "review," Martin distributed a leaflet version of it at a hearing on its rezoning application on December 20. However, the wording of Martin's leaflet "review" did not accord with Jeffers' WINS broadcast, and Martin's account of its preparation of its leaflet does not account for the discrepancies between the broadcast and its leaflet. According to Martin, its leaflet version of Jeffers' "review" was copied verbatim from a transcript of the broadcast typewritten by defendant Yottes.

Yottes says that entirely by chance he heard Jeffers' broadcast at home, taped it later, transcribed the tape and gave the transcript to Martin. Neither Martin nor Yottes have been able on plaintiff's demand to produce his alleged tape or his alleged typewritten transcript. Thus the best evidence of Martin and Yottes' claim that Yottes taped the broadcast and Martin prepared its leaflet from his typewritten transcript does not exist, and it is undisputed that the wording of Martin's leaflet "review" does not accord with Jeffers' broadcast. The unexplained discrepancies between the texts of broadcast and leaflet demonstrate that the source of the leaflet was not the broadcast. The discrepancies coupled with the close similarity between the two can lead reasonably only to the conclusion that broadcast and leaflet had a single common source, one copy of the "review" being used for the leaflet; another, being "planted" with Jeffers

as his script. However, when Jeffers read the script aloud onto tape for his broadcast, he "ad libbed" in three places, putting words into the broadcast that do not appear in the Martin "leaflet."

On Martin's leaflet, directly below its version of the Jeffers' "review," Martin also printed three defamatory so-called "Ms. Guitar Quotes."* These were of its own concoction. None of the three fraudulent "quotes" had ever been uttered by the plaintiff, and she states that they, too, are false and defamatory.

The plaintiff seeks reversal of the order granting summary judgment on the grounds that the court below improperly determined material issues of fact, rejecting all inferences favorable to the plaintiff and resolving all questions of credibility in favor of the defendants. The district court further erred in its application of the First Amendment and the doctrine of fair comment, and it erroneously held that plaintiff has no remedy under the Federal Communications Act.

The Libels

Jeffers' review broadcast over station WINS on December 17, 1972 was as follows:

"The hope of a lot of city dwellers is to find a place in the suburbs or the country with trees and green grass and clean air. Indeed, that 'better life' has long been part of the so-called American dream. But, as you may have noticed, some suburbanites are not too eager to have city folk moving in. An article in yester-

*And another non-defamatory "quote."

day's Times describes resistance in New England
 to new home building. This suburban resistance
 is the subject of a book by Mary Anne Guitar,
 P who is neither a city planner nor an architect,
 P but rather a writer about homes and conserva-
 tion. Her book is PROPERTY POWER. It amounts
 to a handbook on how to keep others out. Not
 just the businesses which have been looking to
 relocate in the suburbs, but also people. Mary
 Anne Guitar recommends an amazing arsenal of
 weapons to keep the suburbs pure -- law suits,
 the ballot box, tax-payer petitions, and many,
 many other devices. The battle cry seems to
 be 'keep the others out.' People become second-
 ary to trees and space ... especially if the
 people are new comers. PROPERTY POWER denounces
 progress even if it means decent, livable homes
 for people. PROPERTY POWER say the rose
 covered cottage in the country is okay for those
 who got there first but must be off-limits to
 those who now would like to breathe some of that
 P fresh country air. The author of PROPERTY POWER
 P lives in Redding, Connecticut and has been busy
 P there keeping HER piece of New England 'clean
 P and green', as it says in her author's biography.
 P Yet Mary Anne Guitar is not a native New
 P Englander. She was born in Missouri. One
 P wonders where she would be living now if someone
 P in Redding had decided to invoke property power
 P in the 1950's when Miss Guitar wanted to move
 P into town. What bothers me about PROPERTY POWER
 is the seeming hypocrisy of it. On one hand the
 P author writes, 'most of us simply want to live
 P on the land.' Then she proceeds to write a book
 P telling how to keep 'most of us' from doing so.
 Published by Doubleday at \$6.95, Mary Anne
 Guitar's PROPERTY POWER is a blueprint for
 exclusion ... and, if followed, I'm afraid
it's a blueprint for stagnation in the
 suburbs. I'm H. Paul Jeffers." (A-306).

The underlining has been added to mark the words that were in
 Jeffers' broadcast but do not appear in Martin's leaflet. The
 marginal notations are with reference to what is set forth
 below.

The plaintiff asserts that Jeffers' broadcast was not
 a bona fide book review but a false and defamatory attack on her
 personally, which completely and deliberately misrepresents

factually the content and subject matter of her book. The entire thrust and impact of Jeffers' broadcast is directed against the plaintiff as a hypocrite who pays lip service to conservation, ecology and the environment while in fact prescribing means of keeping others out of the suburbs.

The contents of the plaintiff's 322-page book speak for themselves. Its title is Property Power: How to Keep the Bulldozer, the Power Line, and the Highwaymen Away From Your Door. As the title states, it is a "how-to" book based primarily on case histories of those who have joined together for the conservation of natural areas confronted with commercial exploitation or government expropriation. The book is addressed to informing citizens of the legal avenues open to them for effective expression and public and political presentation of their views on conservation and the environment. Although the book's subject matter is not to be ascertained from any isolated quotations or passages, a fair appraisal of its subject matter can be gained from reading the "Acknowledgments" at the beginning of the book and the bibliography, which starts on page 310. Not a single publication is listed that could be remotely considered exclusionary or hostile to people. Instead the publications referred to are Audubon, Conservation Leader, National Parks and Conservation Magazine, National Wildlife, Nature Conservancy News, Smithsonian Magazine and others of a similar type.

To set the tone for his misrepresentation of the plaintiff and her book, Jeffers' broadcast at no point gives the full title of the book, but refers to it on five different occasions simply as Property Power thereby purposely omitting the plain-

tiff's definition of what property power is. The purpose and effect of the broadcast was not to "review" the plaintiff's book, but to characterize the plaintiff as a hypocrite. Only half of the broadcast actually relates to the book, and nearly as much is said about the plaintiff personally as is said about her book. As reproduced in the opinion below (A-306) the broadcast covers 47 typewritten lines. Six and one-half lines, the first, second and fourth sentences, are purely introductory, mentioning neither the book nor the plaintiff. Of the remaining forty and one-half lines, sixteen (16) relate solely to the plaintiff personally (indicated marginally by the letter "P"). Twenty-four and one-half relate to the book. Thus out of forty and one-half lines apart from the introductory sentences (which are unrelated to book or author) sixty per cent deal with the book and forty per cent with the author only.

When the defendant Berger, Martin's chief executive officer, prepared Martin's leaflet version of Jeffers' broadcast, he printed beneath it, under the heading "Ms. Guitar Quotes," four alleged quotations of remarks by the plaintiff (A-51-52). Three of these are calculatedly and deliberately false and defamatory. These so-called "quotes" repeat and emphasize the theme of the "review," a false and derogatory charge of plaintiff's hostility to city dwellers.

The first two of Martin's maliciously manufactured and defamatory "Ms. Guitar Quotes" are (A-318):

"My role is to make you feel less guilty about wanting to preserve your wooded boundaries and keep all newcomers out at all costs."

"City people should be made to stay in
the city"

The plaintiff has never made any statement remotely like either of these, and neither the defendants nor the court below has shown that she did. The third, so-called "quote" in sequence, although not a verbatim quotation, accurately reflects the plaintiff's views and is non-defamatory. Martin's fourth "quote" was:

"I would be happy to throw sand in the wheels
of progress."

As printed in the Martin leaflet, this statement is a deliberate and malicious perversion, calculatedly taken out of context, of one clause in a sentence written by the plaintiff in the June 1972 issue of Mademoiselle (A-240 col. 3):

"I had been a strong advocate of land
preservation, been vocally opposed to
'mindless growth' and left little
doubt that, if elected, I would be
happy to throw sand in the wheels of
'progress.'"

Plaintiff's putting quotation marks around "progress" was obviously to make it clear to the reader that she did not mean progress in the ordinary and usual sense of the word but was equating "progress" to "mindless growth." The wholly specious nature of the clause as quoted in the leaflet was demonstrated by Berger himself upon his deposition. Until he was handed a magnifying glass, he falsely contended that he was unable to see the very clear and obvious quotation marks around "progress"
57-58
(A-31-32).

The Parties

The plaintiff Mary Anne Guitar is a self-supporting, single woman, who has earned her own living as an editor and writer ever since her graduation from Smith College in 1943 (A-194). She is the elected, minority, Democratic Selectman in her preponderantly Republican town of Redding, Connecticut. The position is one mandated by Connecticut statute requiring minority representation on all local governing bodies (A-199 ¶19). Since the mid-1960s Miss Guitar has turned her attention both in civic affairs and in her writing to conservation and the environment, specializing in those fields (A-198, A-200). It has been her particular hope that it might be possible for her to perform a service in these areas akin to that of Ralph Nader in consumer affairs (A-200).

Robert Martin Corporation is a major Westchester County builder and developer of high-rise luxury apartments. In the fall of 1972, Martin had embarked on a project to build a complex consisting of such apartments plus office and commercial space in Irvington in the town of Greenburgh. The project was to be known as "Tarrygreen" and to cost \$75 million (D 113 pl1:6).^{*} In order to build Tarrygreen, it was necessary for Martin to apply for rezoning of the tract on which it wished to build (D 113 pl0:15). The defendants Berger and Weinberg are the sole stockholders of Martin (A-30). Berger is president and chief executive officer and Weinberg is its chairman. (A-30-31).

The defendant Margaret Migliore Schneider ("Migliore" hereafter, her maiden name) was Berger's secretary at the time of

^{*}"D" refers to document in record but not appendix, "113" to document number; p to page in that document and ":" to line, if and when designated.

the events covered by the complaint, having held that position since May 1972 (D 116 pp4-5). She, Berger, Weinberg and a Martin vice president had their desks in an executive suite of offices "off by themselves" separated from the rest of the company. No one else performed secretarial work for Berger and Weinberg (D 113 p39:12).

The defendant Yottes describes himself as an independent public relations man, a function he had performed concurrently with working intermittently at WINS as a so-called "casual" part-time employee (D 110 p43). After having held eight different jobs in six years from 1965 through 1971, Yottes had gone on to the WINS casual list in May 1971 (A-294, D 110 p38-43), where he met and worked directly with defendant Jeffers in the same news room (D 118 p44:9, D 121 p80:20, 81:8-82:12). Yottes claims that he temporarily interrupted active work for WINS late in November 1972 (D 110 p11:13). According to Yottes and Berger, the latter hired Yottes for Martin in "early December" 1972 (D 110 p47:12, D 111 p8:3), but Berger's secretary, Migliore, testified she never saw Yottes until after the plaintiff spoke at the meeting on December 13, 1972 (D 116 p8:10). Migliore says that either on the next day, December 14, or the day after, December 15, Yottes came for the first time to the executive suite of Martin and she brought him in to Berger's office (D 116 p9:25). It was on Sunday, December 17, two or three days after Yottes had first come to Berger's office, that Yottes allegedly brought Berger the Jeffers "review" of the plaintiff's book.

The defendant Jeffers was first hired by WINS in 1969

as a "casual" (D 121 p42:24). Prior to that, during the two-year period from 1967 through 1969, Jeffers had worked at some seven jobs (D 121 p15-38). Jeffers was given complete latitude and responsibility for the choice of what he reviewed (D 117 ppl2:2, 13:2, 14:10, 18:6). The plaintiff's uncontradicted evidence shows that Jeffers did not conduct his book reviewing in accordance with the ordinary accepted canons and practices of book reviewers, but rather in the manner of one who poses as a book reviewer but is primarily engaged in promoting, "pushing" or "plugging" little-known books for obscure publishers.

Defendant Lloyd is a vice president of Martin. Migliore and he went to the December 13 meeting where Guitar spoke, took notes and made reports to Berger on the meeting. From these the latter says he fabricated two of the "quotes" falsely attributed to the plaintiff. Lloyd said that he had known of the plaintiff for ten years before 1972 (D 114 p9:16) and had debated her at Mahopac, New York on the subject of her book five or six months before that meeting (D 114 ppl1:12, 14:6). Apparently Lloyd felt that the plaintiff bested him in that debate because in the deposition taken of him as a witness before he became a defendant, he spoke of the plaintiff with resentment, indignation and vituperation, derogatorily terming her "a very shallow woman" and "a re-writer more than a writer" (D 114 pp10:8, 31:19, 32:10).

The defendant Westinghouse Broadcasting Company (Del.) "Broadcasting" is the corporate entity that owns radio station WINS (A-5 ¶3, A-89) an "all news" radio station, whose motto is

"All News All the Time" (D 118 p30:3). It is a component of a group known as the Broadcasting, Learning and Leisure Time Company, which is a unit or element of defendant Westinghouse Electric Corporation (A-138 ¶2, D 120 p44-45) (herein "Electric"). At the time this suit arose D. H. McGannon was the chief executive officer of Broadcasting, an officer of Electric and president of the so-called Broadcasting, Learning and Leisure Time Company component of Electric (D 120 pp29:17, 41:13, 42:11). He reported directly to the Chairman and Chief Executive Officer of Electric and was himself an Executive Vice President of Electric (ibid.).

CHRONOLOGY

The following is a narrative in chronological order of salient events in the development of this case:

March 1969. The defendant Jeffers employed by defendant Broadcasting as a "casual," part-time employee at station WINS, becoming a full-time employee in July 1969.

May 1971. Defendant Yottes first employed by WINS as a "casual," in which capacity he remained until well after the commencement of this lawsuit, working intermittently in active employment for WINS.

June 1972. Doubleday and Co. published the plaintiff's book, Property Power: How to Keep the Bulldozer, the Power Line and the Highwaymen Away From Your Door.

June or July 1972. Defendant Martin's vice president, defendant Lloyd, debates at Mahopac with the plaintiff regarding her book.

Summer 1972. Defendant Martin undertakes preparation for \$75 million Tarrygreen project.

September 7, 1972. Defendant Martin applies for rezoning of Tarrygreen area from single family residential.

October-November 1972 (approximately). Period in which defendant Berger says he got and read a copy of plaintiff's book.

December 1972, "early." Berger and Yottes say that the latter was employed by Martin. He remained a "casual" employee employee of WINS.

December 13, Wednesday evening. Meeting of the "Save Irvington" group at the Irvington High School at which plaintiff speaks. Defendants Lloyd and Migliore present as result of decision of defendants Berger and Weinberg.

December 14 or 15, Thursday or Friday. Yottes is seen for the first time by Migliore, Berger's secretary in Berger's office, to which she conducts him from reception room. Berger tells Migliore to call bookstores and find out where she can get a copy of plaintiff's book for him.

December 17, Sunday, 9:00 a.m. WINS broadcasts tape of Jeffers' "review" of plaintiff's book. Yottes says he hears broadcast at his home, allegedly calls his part-time employer WINS, not to ask for text of tape, but to inquire when it will be rebroadcast.

Same day, at or after 11:00 a.m. Yottes goes to "brunch" given by Martin at Holiday Inn, Elmsford, New York, to promote Tarrygreen. He allegedly tells Berger of Broadcast, and Berger told him he wanted to reprint it.

Same day, at or about 1:00 p.m. and thereafter. Yottes claims he taped Jeffers' broadcast and makes a typewritten transcript of tape.

December 18, Monday. Plaintiff calls WINS to ask for "equal time" to respond to the "review." Berger fabricates "Ms. Guitar Quotes." Lloyd's notes of December 13 meeting are transcribed.

December 20, evening. Hearing held on Martin's application for rezoning of Tarrygreen tract. Martin leaflet with its version of Jeffers' review and "Ms. Guitar Quotes" distributed to the audience.

January 9, 1973. Plaintiff brings suit against Westinghouse Companies, Jeffers, Martin, Weinberg and Berger.

January 28-February 3, 1973. WINS records show Yottes returning to active employment at WINS.

January 31, 1973. Jeffers' employment at WINS terminated.

February 15, 1973. Having learned of Yottes' role in the "review" plaintiff files amended complaint joining Yottes as a defendant.

Facts Developed

Plaintiff Mary Anne Guitar earns her living as a freelance writer on the environment and conservation (A-98, A-200). Her vocation of writing is one that she has trained herself for and pursued for forty years (A-194-200). She has interested herself broadly in public affairs, particularly in the conservation movement (ibid.). In politics she is a liberal Democrat, committed to the traditions of that part of the Democratic Party such as opposition to racial discrimination, public housing for low income families and conservation of natural resources for the use and benefit of all regardless of economic status (A-7 ¶12, A-199 ¶19). She holds political office as the minority member of her town Board of Selectmen, and she has worked actively for such

liberal Democrats as Stevenson, Kennedy, Eugene McCarthy and George McGovern. By the WINS broadcast and the Martin leaflet, the plaintiff has been expressly branded as a hypocrite, intrinsically false to the views she expresses in her vocation as a professional writer and in her activities on behalf of the environment and conservation as a public-spirited citizen. She is expressly and repeatedly charged with dishonesty in her expressed beliefs, which Jeffers and Martin state are no more than a mask for a callous hostility to the problems of the cities and their people. By inescapable inference, the broadcast and the leaflet hold the plaintiff up to public view as a racist and elitist, attitudes that are directly contrary to everything that she has worked for and stood for.

Jeffers' broadcast "review" of the plaintiff's six-month old book could not have in any sense been more precisely and exactly timed to suit the ends and purposes of Martin after the plaintiff's appearance at the December 13, 1972 meeting of the Save Irvington Committee. The evidence to support the defendants' case consists of a chain of literally incredible coincidences. The defendants' theory of coincidence as opposed to design rests on testimony by the defendants which in particular after particular is demonstrably false and contradictory. In granting summary judgment, the court below rejected every inference favorable to the plaintiff and resolved every question of credibility against her. In what follows, this brief will first develop the facts in the chain of "coincidence" and then analyze the contradictions and inconsistencies in the defendants' testimony and other evidence that make defendants' theory of coincidence incapable of belief --

unless of course, the trier of facts elects, as the court below had done without hearing a word of testimony, to credit defendants' denials regardless of the flaws and irreconcilable inferences in their accounts. Every element of circumstantial evidence necessary to prove a plaintiff's case is present: injury to the plaintiff, defendants' motive, their capacity to do what is charged and the wrongful acts themselves.

When the plaintiff spoke by invitation on Wednesday, December 13, 1972 to the Save Irvington Committee (A-206), she was already the subject of hostility and investigation by the officers of Martin. Berger says that he had already read her book and had begun to compile a dossier on her (A-44:17, A-35). As has been said above, defendant Lloyd had had an unfavorable view of the plaintiff for some ten years before the December 13 meeting (D 114 p9:16), had publicly debated the plaintiff five or six months earlier (D 114 p11:12) and was obviously stung and resentful as a consequence of the debate (D 114 p32). In his deposition, Lloyd termed the plaintiff "a very shallow woman," with "no sense of the moral implication of her diatribe," "not exactly an intellectual lion," "a re-writer more than a writer" (D 114 p10:8, pp31-32). The plaintiff had so incensed Lloyd that he went to the December 13 meeting of his own accord without discussing his going with anyone else in Martin (D 114 p22). After the meeting, Lloyd discussed the plaintiff with Berger (D 114 p39). The wholly unfounded importance she assumed in Berger's mind is evidenced by his telling Yottes "That she was spearheading the drive of the Save Irvington Committee . . . leading them and guiding them in their opposition

to [Tarrygreen]." (D 110 p20). Plaintiff had in fact made the one appearance of December 13 before the committee at its invitation, and there has never been any assertion that she had anything else to do with it.

The testimony of Margaret Migliore, Berger's secretary* as to two events that occurred on December 14, the day after the plaintiff spoke or on the following day is inconsistent with the testimony of Berger and Yottes on two critical points. It was their testimony that at some unspecified date, in late November or "early December" Yottes was hired by Martin to prepare for the zoning hearing of December 20, 1972. However Migliore testified that she had never met Yottes until after the plaintiff had spoken at the December 13 meeting of the Save Irvington Committee (D 116 p8). She says that she met him in her office after plaintiff had spoken, either on December 14, the day after the meeting or Friday, December 15 (D 116 pp9-10). Migliore, Berger, Weinberg and a Martin vice president occupied a distinctⁱⁿ and separate executive area "off by [them]selves," and everybody else in the office was off in another area. (D 116 p5:15) She sat directly outside of Berger's office, facing a conference room with a reception area down a hallway to her right (D 116 pp5-7). Except for her and the three officers referred to, no one else worked in the separate executive area. On either December 14 or 15, she left her desk and went out to the reception area to get Yottes and brought him in to Berger. (D 116 p10:5). She had never seen Yottes before.

As noted previously, Berger testified that he had read

* In December 1972 and when deposed.

the plaintiff's book "well in advance of" the December 13 meeting (D 111 p18:17). He categorically stated that he had a copy of the book prior to that meeting (D 111 p35:4). Migliore, however, gives quite a different account. She says that she was instructed by Berger after December 13, 1972 to get a copy of the plaintiff's book (D 116 pp65:13, 66:14). Her account is entirely consistent with that of Lloyd, who testified that he discussed the plaintiff's book with Berger on December 18, the day after the Jeffers broadcast. When asked if Berger had told him then that he had ever read the book, Lloyd answered "no." (D 114 p39:15). To the questions that followed he gave the same answer:

"Q Did he ever at any time tell you that he had read her book? A No."

"Q Then or thereafter? A No." (D 114 p39:16).

Before proceeding further with the facts, it is necessary to advert briefly to the principles of law invoked in this case. The defendants have argued and the court below has held that the complaint must be dismissed on the grounds of fair comment (A-324 incl. f.n.) and constitutional privilege (A-331). Neither the defendants nor the court below have cited any case holding that fair comment and constitutional privilege apply to the facts charged in the complaint: a meretriciously procured publication of a maliciously manufactured, knowingly false utterance masquerading as a bona fide news item for the express purpose of defaming the plaintiff in the eyes of a special audience in order to advance the pecuniary interests of the defen-

dants (A-11).*

The defendants have met the charges of the complaint with a very specific and particularized account of how Martin came to acquire the text of the Jeffers-WINS broadcast. The defendants have staked their entire case on that account. If the jury finds it to be false, as we will show it is, there remains only one inescapable inference to be drawn from the facts, the "review" was manufactured and broadcast through a conspiracy between Martin and Jeffers. The defendants' account of how Martin allegedly acquired Yottes' alleged typewritten transcript of the Jeffers broadcast rests entirely and solely on the oral testimony of Berger and Yottes. Neither the tape that Yottes allegedly made of the broadcast nor his alleged transcript of the tape have been produced. In holding for the defendants, the court below has uncritically accepted defendants' account of the origin of the Martin leaflet in disregard of the best evidence rule and without hearing a word of testimony or observing the demeanor of the key witnesses, Berger and Yottes, on whom the account rests exclusively. The decision below puts an imprimatur on the truth of Berger and Yottes' testimony although as already shown in part with respect to Berger and as will appear further below, their testimony is riddled with material contradictions and inconsistencies.

*Likewise there is no authority for the court's holding that fair comment and constitutional privilege extend to Martin's flagrantly false assertion of the fact of plaintiff's making specific statements of defamatory import, the "Ms. Guitar Quotes," when no such words were ever uttered by her. (A-324 f.n.12).

According to Yottes, at some time between 8 and 9 a.m. on December 17, 1972, he heard Jeffers' review at his home quite by chance while listening to WINS (D 110 p18). Between ten and eleven o'clock that morning, Yottes went to the Holiday Inn in Elmsford for a brunch that Martin was giving to promote Tarrygreen. There, he says, he told Berger about hearing Jeffers' broadcast (D 110 p. 19:23;A-46-47). Berger "decided that it would be advantageous to reprint the review." (A-47:13). Yottes says he telephoned WINS to inquire about the "review's" rebroadcast (A-183), and at about 1:00 p.m. when it was rebroadcast, he taped it, made a typewritten transcript of the tape, returned and gave it to Berger (A-183; D 110 ppl6-18).

Yottes' story contains two inherent improbabilities; first, his taping of the rebroadcast, and second, his consultation with Berger before doing so. Yottes was very vividly aware of Berger's views of the plaintiff, having discussed the plaintiff with Berger "many times" (A-44:11) and having been told by Berger "that she was spearheading the . . . opposition to this development [Tarrygreen]" (D 110 p20:6). It would take no imagination on the part of Yottes or anyone else (cf. Appelbaum affidavit A-214) to perceive that Jeffers' broadcast was completely insulting, derogatory and damaging to plaintiff and could only aid Martin's presentation at the zoning hearing for which Yottes had allegedly been expressly hired to prepare public relations (A-33:15). There was no more need for Yottes to check with Berger before taping Jeffers' broadcast than there would have been for him to have inquired of Berger if he were interested in learning of the slightest item that might discredit plain-

tiff in the eyes of the people of Irvington.

The second inherently improbable aspect of Yottes' account is his allegedly going through the elaborate ritual of phoning WINS, taping the rebroadcast and transcribing the tape. On December 17, 1972, Yottes had worked at WINS as a casual for more than 18 months (A-294-296). He knew Jeffers and Jeffers had worked directly with him as his editor in the same newsroom (D 118 p44:9; D 121 pp80:20, 81:8, 82:12). If Yottes had really heard the broadcast by chance, as he claims, the natural thing for him to have done, would have been to have telephoned Jeffers and had him read the "review" from his script, or to have called a co-worker then on duty at WINS and asked him to play Jeffers' tape over the phone. It made no sense to wait four hours from 9:00 to 1:00 for the rebroadcast. Berger and Yottes have had to adopt the story of the alleged pre-taping conference between themselves at the Holiday Inn "brunch" and the alleged taping of the rebroadcast four hours later for two very good reasons. They wanted to establish as public as possible a locus for the passing of the broadcast script from Yottes to Berger, and, given Yottes' employment by WINS, it was essential in their eyes to portray him as far as possible at arm's length from WINS in getting the text of the Jeffers' broadcast. If Yottes were to testify that he had got the text of the broadcast over the telephone directly from WINS or Jeffers, it would be direct evidence of collusion. Nevertheless, the defendants' entire theory of lack of collusion turns on the credibility of the uncorroborated statements of Yottes. As will be developed below, those

statements are inadmissible under the best evidence rule.

The sum and substance of Berger and Yottes' story is that the latter passed to the former a piece of paper on which was allegedly typewritten a transcript of Jeffers' broadcast. No such piece of paper has ever been produced, and their testimony clearly runs afoul of the best evidence rule, but the court below has in the absence of such a piece of paper, adopted in toto the defendants' account (A-308). Even a purported transcript made by Yottes of Jeffers' broadcast, no matter how self-serving and questionable it would obviously be, might, were it not for one fact, lend some credence to Berger and Yottes' testimony. That fact, as noted above (p6), is that the text of Jeffers' broadcast as purportedly reprinted in Martin's leaflet differs in three undisputed passages from the text of the "review" by WINS. Thus the Berger/Yottes account that the leaflet version of Jeffers' "review" was copied directly from a transcript (A-49) of a tape made directly from the broadcast is not corroborated by the leaflet's text.

Berger at first flatly disavowed any recollection of what had become of the typewritten transcript that Yottes purportedly gave him (A-48:7). Nevertheless, he had retained and was able to produce the transcriptions of the notes allegedly taken four days earlier by Lloyd and Migliore at the December 13, 1972 meeting (A-185; A-233-39), yet there is not writing of any sort to substantiate the Berger/Yottes account of the transcript Yottes says he gave Berger on December 20 after the brunch.

In the absence of the best evidence that Yottes gave Berger a transcript of the Jeffers' broadcast, Berger's account of what he did with that alleged transcript becomes critical, and

that account is, as will be shown, entirely devoid of credibility. When Berger was first asked what he had done with the transcript that he said he had received from Yottes (A-48:7), he successively answered "I don't recall," "No, I have no record" and "I have no recollection, sir." Then following the very explicit interjection of his attorney, Berger said that he had given the transcript to "somebody on the office staff. I don't know." (A-49:16). When questioned further, Berger said he might have given the transcript to "A number of clerks and secretaries working for me" and "Miss Migliora[sic] would probably be the one." He then answered "Yes" when asked if "It was to her or someone else in your office that you believe you gave the copy that you believe was given to you by Mr. Yottes."

However as the later examinations of Weinberg and Migliore developed, there was no one else in Berger's office. Only Migliore worked for Berger, no one else, and he had not given her the transcript. She testified that most of her work was "generated by Mr. Berger" (D 116 p7:19) although she was and had been secretary to both Berger and Weinberg since May of 1972 (D 116 p4:7). When asked if she had any assistants, she responded "No, I don't" and stated categorically that there was no one else who worked in the executive area with her other than Berger, Weinberg and Martin's Executive Vice President Corton (D 116 pp4:25-5:10). It remained for Berger's partner and the chairman of Martin, Weinberg to state definitively that no one else worked for Berger (D 113 p39):

"Q Are there others who perform secretarial functions for you and Mr. Berger? A No.

"Q No one else? A No.

"Q And, at the period we are discussing; that is December 13th to December 20, 1972, was there anyone else who performed secretarial functions? A No."

Finally Migliore was categorical and explicit in stating that she had never seen the Martin version of the Jeffers' broadcast until she saw it in its final printed form about 4:00 p.m. on December 20, the afternoon before the zoning hearing. The material came in in boxes from the printer, and Migliore had to go outside of her office and find people to come in and help her collate and staple the printed materials, including the leaflet version of the broadcast (D 116 pp56-59). When asked if she had ever seen any of the text of the Jeffers broadcast prior to 4:00 p.m. on December 20, 1972 (to which the "Ms. Guitar Quotes" were appended), Migliore denied having seen it or any part of it (D 116 pp59:11-61:10). Migliore was then asked:

"Q When I asked if you ever saw it, you never typed it or had any other contact with that material before that time [4:00 p.m. December 20, 1972]? A No." (D 116 p61:11).

Thus there is no foundation for admitting the Berger/Yottes testimony in the absence of the best evidence, the supposed transcript itself. Berger's account of his disposition of the alleged transcript is wholly inconsistent with the testimony of his own partner, Weinberg, and his own secretary, Migliore. Contrary to what Berger testified, Migliore and no one else worked for him, and she unequivocally testified that she never

saw the Jeffers broadcast in any form until it came to her in the late afternoon of December 20, printed in the final leaflet for collating and distribution at the zoning hearing that evening.

In summary, then, the defendants' contention that the Martin leaflet "review" was a transcription of the Jeffers-WINS broadcast fails on two counts. First, there is the wholly objective and undisputed evidence that the wording of the broadcast and the wording of the leaflet are not the same. Secondly, there is no credible, or even admissible, evidence to support the defendants' account of how Martin acquired the text of the broadcast.

Yottes

In granting summary judgment in this jury case, the court below has adopted in its entirety the defendants' versions of the facts without hearing a word of live testimony or observing the demeanor of those who have expounded that version. The critical testimony of Berger is riddled by the fatal contradictions of those who worked with him and for him. Of necessity Yottes' testimony is as tainted as Berger's for there is nothing beyond Yottes' and Berger's own words to support Yottes' claim that he taped the Jeffers' rebroadcast and made a typewritten transcript of the tape. Yottes testified that he could not produce a copy of the written transcript that he allegedly gave Berger (D 110 pl8:13). Nor does he have the tape that he claims to have made (ibid.).

Yottes' testimony fails not alone on the key issue of the absence of any writing that could be the alleged tran-

script on which the Martin leaflet was allegedly based. In addition either Yottes' or Jeffers' testimony must be false on the equally material question of the relationship between the two men. When Yottes was asked "Did he [Jeffers] edit for you? Were you connected with him in the ordinary work?" (D 110 p21:19) Yottes answered "No sir. I got assignments from the newsmen." Jeffers, however, testified quite to the contrary. When asked what his work with Yottes was, Jeffers answered "It would be the same as my relationship as an editor to any other writer."

"Q In other words, he would write and you would edit; is that correct? A Yes.

"Q Was your work with Mr. Yottes at the studio of WINS? A Yes." (D 121p82:14).

Jeffers

In the chronology of events related to Martin's application for rezoning for its \$75 million Tarrygreen project, and the local opposition to that project, Jeffers' personal attack on the plaintiff in his broadcast "review" could not have been more precisely timed to serve Martin's purposes. On the other hand, the timing of Jeffers' "review" was in every respect entirely inconsistent with the self-proclaimed mission of WINS and with Jeffers' own practice as WINS's "book reviewer." As Jeffers agreed, WINS was what is known as "an all news station" (D 121 p47:15). Its slogan was "All News All The Time" (D 118 p30). The plaintiff's book having been published in June of 1972 was hardly "news" at the time of Jeffers' broadcast, Sunday December 17, 1972. However, as his broadcast dates indicate (A-243-290) it was WINS's custom to broadcast Jeffers'

"reviews" only on weekends. The plaintiff had spoken on Wednesday, December 13, and the zoning application was to be heard on Wednesday, December 20, so the weekend of December 16-17 was ideally situated for Jeffers' broadcast from Martin's standpoint, regardless of its not being news.

Examination of Jeffers' reviews (A-248-290) and the tables that accompany them with supporting affidavits (A-221, 224, 243-247) shows that in keeping with WINS's motto, it was Jeffers' practice to review only books that had news value in that they were themselves new or were related to a news item. With the exception of the only reference book that Jeffers ever reviewed, there is not a single instance of his reviewing a book that was over six months old as was the plaintiff's. All of the rest of his reviews were of "trade books" such as the plaintiff's (A-219) and all of them were broadcast within a month or so of the publication date of the book. Appearing as it did in June, the plaintiff's was a "summer book" dealing with the environment, and not the type of book likely to appeal to a Christmas audience. On the corresponding Sunday a year earlier, Jeffers related his review to Christmas, as one would expect (A-254).

As his stated pretext for the "review" of plaintiff's book, Jeffers made a vague reference to an article in the New York Times on the previous day related to "Resistance in New England to new home building" (A-15). He then stated "This suburban resistance is the subject of a book by Mary Anne Guitar . . ." (ibid.). Conceivably there may be those who view New England as one vast suburb, but it is very clear that the New York Times article which Jeffers referred to did not deal with

the suburbs at all, but with vacation homes, principally in the ski areas (A-130). The word "suburban" appears exactly once in the article. The dateline "Montpelier, Vt." and the context of the entire article demonstrate that it is not concerned with the suburban areas Jeffers referred to. The wholly empty character of Jeffers' contention that the Times article dealt with the suburbs was demonstrated by Jeffers' answers when asked to relate it specifically to the suburbs. When Jeffers was asked at his deposition of what city Montpelier, Vermont was a suburb, his attorney instructed him not to answer! (D 121 pl22:12). Jeffers confessed ignorance of Wilmington, Vermont, the community featured in the photograph that headed the Times article (A-130).

One of the most telling betrayals of the true purpose of Jeffers' "review" of the plaintiff's book lies in a comparison of its treatment of the plaintiff with his treatment of authors in other reviews. WINS submitted some sixty-five "reviews" by Jeffers. In only one of these is there as much as a single disparaging personal reference to an author (A-222-223 ¶4d). In only five out of his sixty-five "reviews" did Jeffers make any type of adverse comment or criticism. None of these was more than six or eight words in terms mild for these days. Except for the single personal reference, he applied expressions like "baloney," "poppycock" and "rip-off" only to the book, never the author (A-222-223). In contrast, as noted above (p.9) forty per cent of the text of the actual "review" portion of Jeffers' broadcast dealt with the plaintiff personally at great length and with great particularity.

With reference to the defenses of fair comment and con-

stitutional privilege as well as the inherent lack of good faith in Jeffers' broadcast, the plaintiff has submitted extensive and specific evidence to show that Jeffers was not in truth a "book reviewer," but merely one who masqueraded as a book reviewer while "puffing," "pushing" and "plugging" books for publishers. In their desire to avoid an issue of fact, the defendants have not controverted a single item of the evidence put forward by the plaintiff to show that Jeffers was not a bona fide reviewer. However, despite the admission inherent in Jeffers' failure to deny, the court below has characterized this evidence of the plaintiff's as "egregious" and dismissed it out of hand with no attempt to cite authority or assert that the customs and practices of book reviewers are facts of which the court may be deemed to have judicial notice.

The evidence against Jeffers as a bona fide book reviewer is set forth in the affidavits of the plaintiff, who herself has been a book reviewer; Lis Harris, a book reviewer for The New Yorker magazine, the Village Voice and the New York Times (A-218); and Carole Dolph, Promotion Director for Doubleday and Co., Inc., America's largest publisher (A-217). The first challenge to Jeffers' authenticity as a book reviewer arises from his statement that he bought the copy of plaintiff's book that he "reviewed" as it was his practice to buy all the books that he "reviewed" (A-98-100). Jeffers said WINS paid him \$20.00 for each book he "reviewed." Deducting \$6.95, the price of plaintiff's book, plus sales tax would have left Jeffers with something less than \$13.00 as his net remuneration for "reviewing" her book. Jeffers' claim that he bought all the books he

"reviewed" borders on the incredible. He was unable to recall where he had bought the plaintiff's book (D 121 p86:16) and here again, Jeffers' counsel refused to permit him to answer when asked where he had charge accounts (D 121 p77).

The undisputed evidence submitted by the plaintiff shows that a regularly employed, bona fide book reviewer, as Jeffers claims he was, gets from ten to twenty free books for each one he reviews, and it is the practice for a reviewer to resell these books (A-208, 219). Free books can add as much as \$10,000 to \$30,000 a year to a book reviewer's income (A-242, 291). If Jeffers was a true reviewer, it is close to unbelievable that he, who had in one period eight jobs in two years in his eagerness to earn money (D 121 p15-38), would neglect this substantial additional income and instead buy his books out of his own pocket, particularly when he knew "that review copies of books constitute a sizeable source of income for book reviewers" (A-100).

Jeffers' claim to be a bona fide book reviewer fails in two other respects. Of the sixty-five Jeffers "reviews" submitted by WINS, only eight, or less than one out of every eight, were on the best seller list (A-209, 223). Reviews of unknown and unpopular books are hardly compatible with WINS's slogan "All News All The Time." Furthermore, although Doubleday is far and away the largest publisher of trade books, Jeffers reviewed only one other Doubleday book aside from the plaintiff's, further evidence that Jeffers was not interested in books most apt to be read. Finally, the plaintiff notes

that in his "reviews" Jeffers relied heavily on tapes distributed by publishers for publicity purposes (A-210). None of these factual assertions on behalf of plaintiff have been disputed, including the plaintiff's conclusion based upon them that Jeffers was in fact not a bona fide book reviewer, but "first and foremost a promoter for publishers." Jeffers has denied that he was engaged in selling his "reviewing" services to publishers (A-100), but he has not attempted to deny or explain any of the evidence that discredits his denial.

As has already been observed, the testimony of Berger and Yottes does not stand up when compared with that of other witnesses. In Jeffers instance, there are not only repeated absences of internal incredibility and inconsistency but set forth below are numerous instances of a quibbling lack of candor. When these are added to his attorney's previously noted refusals to permit Jeffers to answer clearly proper questions, there emerges the picture of a defendant with knowledge so guilty that he dare not be forthright. Yet the court below has granted the defendants complete summary judgment without seeing or hearing testimony of Jeffers or any other party or witness.

When asked for his impression of the plaintiff's book and his reaction to it, Jeffers' answer was that he did not understand either the word "impression" or "reaction" (D 121 p90-91). Jeffers went on to deny successively that he understood the meaning of "favorable effect," "well written" and "good idea" (D 121 p91-92). Subsequently with the obvious fear that he might be led into some type of damaging admission or contention Jeffers stated that he was unable to apply the familiar terms

"favorable review," "unfavorable review," "good review," or "bad review" to the plaintiff's book because, he said, although he understood the terms, he did not himself use them. (D 121 pl22: 23-124:4). These are all widely understood expressions, particularly to people involved in or interested in the arts, and Jeffers' refusal to acknowledge them can only indicate fear of either contradicting the sense of his broadcast or being led in to a damaging confirmation of it.

Summary of the Salient Facts

The plaintiff has shown that the only reasonable inference to be drawn from the evidence is that Jeffers' WINS broadcast was the product of a conspiracy and corrupt agreement entered into for the purpose of "reprinting" the broadcast in Martin's leaflet. This is demonstrated by the timing of the broadcast, its content, Jeffers' record as a "book reviewer" and the defendants' inability to present an account of the origin of the leaflet "review" that is consistent, credible or even plausible.

As to the timing of the "review," there is the concatenation of plaintiff's appearance, Jeffers' broadcast and the distribution of the leaflet "review" at the zoning hearing. A day or two after plaintiff spoke, Yottes made his first appearance at Berger's office. During those same days, Berger was engaged in preparation for striking back at the plaintiff. He asked his secretary to buy a copy of her book, reviewed the notes that Migliore and Lloyd had made at the meeting and embarked on his preparation of the "Ms. Guitar Quotes," which would have been valueless if not presented, as they were, as if

they came from her book.* Further evidence that the timing of the broadcast was not a coincidence is found in the six-month gap between the publication date of the book and the broadcast date, a delay inconsistent with WINS's proclaimed "All News" format as well as Jeffers' past practice in "reviewing." A further incongruity in the date of the "review" lies in the book's having been published as a summer, outdoor book and being reviewed in winter, just before Christmas when WINS listeners presumably would be most interested in learning of books that they might give as presents.

In content, Jeffers' "review" deals with plaintiff personally nearly as much as it does with her book. In that it is dissimilar from any other "review" of Jeffer.. No one hearing his broadcast or reading the leaflet could miss the intent to denigrate and defame the plaintiff. Jeffers' broadcast completely misrepresents the content and subject matter of the book, and deliberately avoids even the slightest allusion or reference to the true subject matter.

The bona fides of Jeffers' broadcast must be measured against his credentials as a "book reviewer." The uncontradicted evidence is that he neglected a major source of a book reviewer's income, free review copies, which are worth many times what he could possibly earn by buying his own books and receiving only

*In this there is further proof of irreconcilable inconsistencies in defendants' testimony. Berger says two of the "His. Guitar Quotes" are based on Lloyd's notes of the plaintiff's speech (A-52-54, 233). He says he prepared the "Quotes" on Monday, December 18 (A-38). Lloyd says he got his transcribed notes back that same day, December 18 (D 114 pp19-20). But Migliore has positively testified that Berger had handed her Lloyd's same transcribed notes on Thursday, December 14, the very next day after the plaintiff spoke (D 116 pp71-72).

\$20.00 per "review." The evidence is uncontradicted that he used publisher's tapes in his "reviews," and he himself stated that he used publisher's press releases (D 121 p74:12) both of which demonstrate what Jeffers has not denied, namely, that as a "book reviewer" he was engaged primarily in promoting books for publishers.

The plaintiff completely rejects the contention that fair comment and constitutional privilege can apply to this case because it is of the essence of those two principles that the challenged words be the honest expression of the writer or speaker. (Compare opinion below, A-313, A-324). To all the circumstances in this case showing the defendants made a calculated personal attack on the plaintiff by corrupt means for pecuniary gain, the defendants have interposed and sharply defined an explicit, allegedly factual account purporting to explain how through pure coincidence and the brunch meeting of Yottes and Berger, the Jeffers broadcast ended as a leaflet distributed by Martin at the zoning hearing. The bridge by which the defendants endeavor to join the broadcast to the leaflet rests on an arch without a keystone, the missing transcript of the broadcast that Yottes alleges he handed to Berger at the Holiday Inn brunch.

Thus the defendants have failed to substantiate with any credible evidence the alleged circumstances on which they argue that it was pure coincidence that the broadcast of Jeffers' "review" came at precisely the correct time for use in the Martin leaflet. All they have confirmed is the plaintiff's charge that it was Yottes who was the instrumentality employed to provide a purported "review" of the plaintiff's book for Martin's purposes.

A R G U M E N T

POINT I

The Evidence Demonstrates that the
WINS Broadcast and the Martin Leaf-
let were False, Defamatory and
Malicious

It has long been settled law that an author's work is subject to the most stringent criticism but not to false representation of the facts set forth in his work. Triggs v. Sun Printing and Publishing Association, 179 N.Y. 144 (1904) held:

"It is true that an author when he places his work before the public invites criticism, and however hostile it may be, the critic is not liable for libel, provided he makes no misstatements of material facts contained in the writing and does not go out of his way to attack the author." 179 N.Y. at 154

Here the very gravamen of the complaint, amply supported by the proof, is that the defendants deliberately and maliciously misstated content and subject matter of the plaintiff's book while going deliberately out of their way to attack the plaintiff for hypocrisy. "What bothers me about PROPERTY POWER is the seeming hypocrisy of it." (A-306).

The court below has rejected the plain meaning of this sentence by making a finding of fact to the effect that

"The phrase 'seeming hypocrisy' is a comment referring to the book's content; it is not aimed personally at plaintiff." (A-314, f.n. 5)

In this finding, the court has in effect created a new and unprecedented definition of "hypocrisy." Hypocrisy is a human attribute which relates to expressions of sentiments contrary to what one believes.

"hypocrisy * * * from G[ree]k hypokrisis
act of playing a part on the stage * * *:
of feigning to be what one is not or to
believe what one does not; esp: the
false assumption of an appearance of
virtue or religion.

"hypocrite * * * one who affects virtues
or qualities he does not have: dissembler * * *"
Webster's Seventh New Collegiate Dictionary
410 (1961)

There is no sense in which a book, an inanimate thing of paper and ink without mind or soul, can be charged with hypocrisy unless it is an expression of the author's hypocrisy, which is beyond the shadow of a doubt what Jeffers was saying. Books do not have beliefs; they can only express the author's beliefs, and if the expression is false, it is only because the author is false, which is what Jeffers and Martin wanted people to understand about the plaintiff.

If there can be any question of the meaning and connotation of "hypocrisy," it is not discernible from any reference that has been consulted, and in any event it is a question of fact. It is in the province of the jury to determine what the defendants meant by "hypocrisy" and to whom they meant the word to apply.

In respect of the definition just noted as well as in every other construction of the defendants' words in the broadcast and the leaflet, defendants and the court below have chosen to adopt constructions and connotations at complete variance with the plain meaning of Jeffers' and Berger's words. In adopting these strange constructions, defendants and the court below have pointedly ignored New York law in the matter as expressed by Judge Fuld in Mencher v. Chesley, 297 N.Y. 94, 99

(1947):

"It has long been the rule that words charged to be defamatory are to be taken in their natural meaning and that the courts will not strain to interpret them in their mildest and most inoffensive sense to hold them non-libelous."

Both the complaint (A-8-9) and plaintiff's affidavit in opposition to summary judgment (A-202), charge that the "review" as a whole as well as certain specified passages standing by themselves are false and without any foundation in the plaintiff's book. In holding that the "review" does not consist of statements of fact but is as a matter of law fair and reasonable comment (A-314, 324), the court below has chosen to disregard the plain meaning of Jeffers' words to put upon them a gloss that would not occur to the hearer of the broadcast. It is perfectly clear that Jeffers intended his hearers to understand as a fact that the entire subject of plaintiff's book was "suburban resistance to new home building," that it was "a handbook on how to keep others out" (pp6-7, supra). The same statement is repeated again and again in paraphrase and is the only statement Jeffers makes about the plaintiff's book.* This is a statement of fact just as much as ~~is~~ is a reviewer's statement that the subject of a book is ships or shoes or sealing wax, cabbages or kings. There was nothing in Jeffers' broadcast to indicate that the book even ostensibly had any other topic. A-

* " * * * keep the suburbs pure * * * 'keep the others out.'
* * * PROPERTY POWER denounces progress even if it means decent, livable homes * * * the rose covered cottage in the country is okay * * * must be off limits to those who would now like to breathe . . . fresh country air * * * a book telling how to keep 'most of us' from [living on the land]." (pp6-7, supra).

part from the introductory sentences, the broadcast has only two topics, the plaintiff personally and a constantly reiterated statement that the book's subject is keeping city people out of the suburbs. No listener nor reader could have reached any other conclusion.* Indeed, on their depositions both Jeffers and Berger stated that the book's topic was "keeping others out."** Jeffers' "review" misrepresented the content and the subject matter of the plaintiff's book as an entity, and his "review," must, therefore, be factually evaluated against the book as an entity. However, in support of his holding of fair comment, the court below has put a gloss on the review for which there is no basis and has then gone on to support that gloss with nine passages from the book chosen eclectically out of context. The court below said:

"The following passages in plaintiff's book do not unreasonably lend themselves to the interpretation that one of the author's goals is to limit the immigration of 'new-comers' into rural and suburban communities:" (A-322, f.n.11; emphasis added).

There is nothing in Jeffers' "review" that could have led any listener or reader to understand that what he was saying was to apply only to "one of the author's goals" although that, too, would have been as much of a misrepresentation as what Jeffers did say. In putting this completely unjustified gloss on the

*See the affidavit of Ralph Appelbaum (A-214).

**Jeffers' deposition, Schedule JX at end (D 121) says that "keep others out" in the various forms that he has used is based on "The jacket, the jacket notes, the title page, the table of contents, chapters 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, appendices." The attachment to Berger's deposition (A-84) makes a comparable statement, "This is my general impression and conclusion from reading the entire book; specifically, chapter 4, and chapter 9 support this conclusion on my part."

"review," the court has tacitly conceded that without the gloss Jeffers did misrepresent the book's subject and content.

The plaintiff's book must be judged as a whole, as it was written. It is not a collection of isolated passages that may be taken out of context. Its theme is the environment, conservation and open space, everywhere, the cities, the suburbs, the seashores, throughout the country.* Jeffers' "review" states the book's content and subject matter as a fact, and it is as a fact that it must be determined by the trier of fact. In selecting isolated passages out of context, the court below is not deciding the issue the parties have created. As noted above, defendants insist that the entire book supports Jeffers' statements. The plaintiff insists that the entire book shows that the "review" is false. Jeffers says the book's subject is suburban

*The following twenty-three topics taken from one end of the book to the other illustrate the book's true scope: (p9) the redwoods and the Grand Canyon, (p18) Riverside Park in New York City's Upper West Side, (p21) Crotona Park in New York City, (p38) an historic landmark in Exeter, New Hampshire, (p39) park vs. parking lot in Mt. Kisco, (p54) an historic house in North Andover, Massachusetts, (p122) sufficient open space for the seventy million people in the Boston-Washington megalopolis by the year 2,000, (p127) the Missitissit River in Massachusetts and New Hampshire, (p136) public acquisition of open space land by the Welfare Council of Chicago, (p176) the 185-mile Chesapeake & Ohio National Historical Park along the Potomac River, (p179) the Joyce Kilmer-Slick Rock Forest Wilderness in Tennessee, (p182) planning for public housing, sewers and water treatment facilities, (p190-1) open space in Weymouth, Massachusetts, (p191) "beautification" as advocated by Ladybird Johnson, (p195) conservation of open space in conjunction with building development, (p229) pollution of Lake Washington in Seattle, (p231) conservation activities of the Ford Foundation from coast to coast, (p241) the California Water Quality Control Act, (p248) lengthy quotation stating that those who "get there first" do not have the right to "keep others out," but a balance must be struck between the need for open space and the need for development, (p250) possible hazards of nuclear power, (p255) industrial development in Maine, jobs vs. environment, (p278-9) land viewed as not truly private property but held for the benefit of all.

exclusion; the plaintiff says it is conservation and the environment, everywhere on every level. The court below has stated:

"A necessary result of the implementation of land trusts, land use controls and open space programs is the unavailability of land for newcomers; in this sense the book does advocate 'keeping others out,'
* * *" (A-322)

The court's argument would apply as well to the National Parks, to Central Park in New York City and to public open space everywhere.

Coming to the "Ms. Guitar Quotes" of which Berger has admitted authorship (A-52), it has already been pointed out above (p10) that Berger achieved "I would be happy to throw sand in the wheels of progress" by deleting two-thirds of the sentence of which it was a part and removing quotation marks that plaintiff had put around "progress." The remaining two defamatory "Ms. Guitar Quotes" do not even have that tenuous a connection to anything said by the plaintiff. Berger manufactured them out of whole cloth.*

As to the first of these, Berger was able to produce nothing to show that the plaintiff had ever said "preserve your wooded boundaries" or "keep all newcomers out at all costs." (A-53-54). As to the second one, Berger could quote nothing that even inferentially supported the thought that plaintiff had ever said anyone should be "made to stay" anywhere. (A-53-54).

The court below has attempted to distinguish the pres-

*(1) "My role is to make you feel less guilty about wanting to preserve your wooded boundaries and keep all newcomers out at all costs." (2) "City people should be made to stay in the city."

ent case from those holding it to be libelous to forge an author's name to a work she did not write where the content of the work reflects injuriously on the author's reputation (A-316). The court's distinction is not valid. In the first place, the "Ms. Guitar Quotes" did exactly what the cases condemn. They were falsely presented as statements by the plaintiff. In the second place, it is not how the views are attributed to the author but the nature of the views attributed to her. Otherwise the court is merely suggesting that these cases would apply if the same statements in the defendants' "review" had been couched in the first person and the plaintiff's name attached, as for example:

"My book is PROPERTY POWER. It amounts to a handbook on how to keep others out. * * * I recommend an amazing arsenal of weapons to keep the suburbs pure * * * I denounce progress even if it means decent, livable homes for people. I say the rose covered cottage is okay for those who got there first but . . . off limits * * *" (cf. 7 supra).

In point of fact, the court's assertion was expressly disposed of by Ben-Oliel v. Press Publishing Co., 251 N.Y. 250, 255 (1929), in which the court expressly equated the libelous impact of the views falsely attributed to plaintiff whether put in the first person or the third person:

"In order to constitute a libel, it is not necessary for the defendant in its paper to directly attack the plaintiff as an ignorant imposter. The same result is accomplished by putting in her mouth or attaching to her pen words which make self-revelation of such a fact. One may say of a physician that he is an ignorant quack, or he may print a statement by the physician regarding some operation performed by him or some treatment of a disease which shows him to the profession to be an ignoramus and a bungler. Both of these publications would be libelous. This publication regarding the plaintiff is an attack upon her profession and liveli-

hood, and is libelous without plea or allegation of special damage."

In the present case, Jeffers and Berger did both. They called plaintiff a hypocrite, and they falsely attributed to her statements which, if true, made her a hypocrite.

In Ben-Oliel v. Press Publishing Co., supra plaintiff was a professional lecturer, writer and teacher. She specialized on the life and social customs of Palestine and Mosaic symbolism. Her livelihood was dependent upon her reputation as an authority on those subjects, just as the livelihood of the plaintiff here as a free-lance, non-fiction writer on environmental subjects depends on her reputation for veracity and sincerity in her lifelong commitment to conservation and the environment.

The defendant in Ben-Oliel had published an article allegedly but not in fact written by the plaintiff therein. The article purported to state the plaintiff's views of social customs of Palestine under Mosaic Law, particularly the customs and conditions of ideal marriage and divorce. Plaintiff alleged that the article was false, ridiculous and grotesque, and that the attribution of absurd reports to her as a skilled and experienced professional traveler and observer made her out as ridiculous, a fraud, a deceiver and a charlatan. Such views portrayed her as being ignorant as well as stupid in her profession and livelihood.

In the present case, the defendants have deliberately portrayed the plaintiff as a hypocrite whose only motive is to keep city people out of the suburbs. In Ben-Oliel the court, Crane, J., states at 251 N.Y. 255:

"The law of libel is very simple, and, briefly, is this: 'Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable.' When proved to have been spoken in relation thereto, the action is supported, and unless the defendant shows a lawful excuse, the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and resulting damage are presumed." * * * [full citations omitted] Triggs v. Sun Printing & Pub. Assn. (179 N.Y. 144); d'Altomonte v. New York Herald Co. (154 App. Div. 453; affd., 208 N.Y. 596); Sanderson v. Caldwell (45 N.Y. 398, 405) * * *

In d'Altomonte v. New York Herald Co., 154 App. Div. 453 (1st Dept. 1913) modified 208 N.Y. 596, the plaintiff was a noted news correspondent, traveler, writer and lecturer of recognized ability. He alleged he was a well-known authority on criminology, African life and politics, and had written books, articles and pamphlets on these subjects, which had attained wide circulation.

D'Altomonte complained of an article falsely attributed to him in the defendant's newspaper, entitled "Stopping a Congo Cannibal Feast . . ." The plaintiff alleged that it had been fabricated by or for the defendant and represented him as having an absurd and improbable adventure, exposing him to the natural inference, suspicion and belief that he was guilty of sensationalism, bad taste, falsifying and fabricating facts, incidents, names, placed and situations.

The court held at page 455:

"I think the publication ascribing the authorship of such an article to a man of the standing and reputation which plaintiff claims for himself, admitted by the demurrer, if false and a forgery, is calculated to hold him up to ridicule and contempt and to destroy his influence as a writer and lecturer, and is susceptible of the construction and the consequences placed upon it

by the complaint. I think it comes within the spirit of the decisions in Triggs v. Sun Printing & Pub. Assn. (179 N.Y. 144) and Holm v. Holm (146 App. Div. 75)."

See also the dissent which stated:

"Doubtless it would be libelous to falsely attribute to an author an obscene or profane article, or one which expressed sentiments abhorrent to right-thinking people, for such an article would hold the putative author up to scorn and contumely, but the article complained of here is not such an one." (Emphasis added) 154 App. Div. 453, 457.

Today and for many years past the sentiments that the defendants have falsely and deliberately ascribed to the plaintiff have been "abhorrent to right-thinking people." There may be those who hold such sentiments but the plaintiff has consistently demonstrated that she is not one of them.

Clevenger v. Baker Voorhis & Co., 10 A.D. 2d 365 (1st Dept. 1960) was an action by the author of Clevenger's Practice Manual of New York. In 1923 plaintiff had sold his work and its copyright to defendants with his name to appear in the title. He continued to edit each issue through 1956, when he terminated his editorship and revoked his consent to the use of his name as editor. Plaintiff conceded that under the contract defendant was entitled to use his name in the book's title, but he charged misuse of his name when coupled with the words "annually revised" on the title page of the 1959 edition, which he alleged contained over 200 misleading errors of omission and commission, harmful and injurious to his reputation as a lawyer and legal writer. Plaintiff alleged that by failing to name the true authors of the 1959 revision, the defendants "intentionally created false impressions on lawyers and purposely deceived and

misled them to believe that plaintiff, not defendants, edited the 1959 edition." The majority of the Appellate Division rejected the premise of the dissent that the title page would lead a reader to believe the 1959 annual revision had been made by Clevenger himself.

The dissent maintained it was for the jury to decide whether the revision could be attributed to the plaintiff's authorship, and if so, whether such fact would tend to injure plaintiff as a lawyer and legal author, citing Ben-Oliel v. Press Pub. Co., supra, 251 N.Y. 250, 256 (1929), and d'Altomonte v. New York Herald Co., supra, 154 App. Div. 453, (1st Dept. 1913) mod. 208 N.Y. 596. On appeal, the Court of Appeals reversed in Clevenger v. Baker Voorhis & Co., 8 N.Y. 2d 187 (1960), adopting the Appellate Division dissent. Although the complaint had not specifically alleged libel, the Court of Appeals held:

" * * * Under familiar rules, we must accord the complaint a liberal construction (Civ. Prac. Act §275), and if it states in some recognizable form, any cause of action known to our law, then it was improperly dismissed below (Dulberg v. Mock, 1 N.Y. 2d, 54, 56; Al Raschid v. News Syndicate Co., 265 N.Y. 1, 3)." 8 N.Y. 2d at 188

* * * *

"We agree with the dissenting Justices in the Appellate Division that the complaint states a cause of action in libel. The gravamen of the wrong pleaded is that the numerous errors of omission and commission in the 1959 edition of the work, impliedly attributed to plaintiff by the misleading format of the title page, have 'irreparably impaired' his otherwise excellent reputation as a reliable legal writer and lawyer. Since a jury could reasonably find that the wording and arrangement of the title page in question would mislead the reader to believe that the revision work had been done by plaintiff, the facts pleaded amount to actionable defamation." 8 N.Y. 2d at 190.

In order to defame and disparage the plaintiff here through her book, the defendants here deliberately contracted its full title as displayed on the title page, thereby concealing from their audience at the very outset the true subject of the book and the true sentiments of the plaintiff.

In Sanderson v. Caldwell, 45 N.Y. 398 (1871), where a newspaper article alleged that plaintiff, a lawyer and a candidate for political office, drank to excess, to such a degree as to disqualify him from the transaction of his professional business, and improperly, dishonestly and fraudulently obtained money from the soldiers and sailors of his district in collecting their claims against the government for a "fearful percentage," the article was held to be libel per se. The court stated it was a just inference that the words used related to him and his professional character as an attorney and held:

"It would be quite impossible for a person whose character had been assailed by slanderous words to follow them and establish by proof all the injurious consequences, although it might be quite certain that injury had been sustained, which was not capable of definite proof.

"The law, therefore, when the publication of the libel has been shown, not only imputes malice to the defendant, but presumes that damages have been sustained by the plaintiff in consequence of the unlawful act of the defendant." 45 N.Y. at 403

The earliest New York case in this field involved the famous author James Fenimore Cooper. Cooper v. Stone, 24 Wend. 434 (Sup. Ct. of Judicature 1840) held:

"If [an author] has made himself ridiculous by his writings, he may be ridiculed; if they show him to be vicious, his reviewer may say so. But the latter has no right, therefore, to violate the truth in either respect. The difficulty of sustaining this de-

murrer lies in its admitting that the plaintiff's moral character has been falsely and maliciously assailed by the defendant. This being imputed in the declaration, it behooved [the defendant] to show that what he said was true, or, at least, that it was no more than a fair deduction from the plaintiff's works. The question is one of good faith. It is always so in the case of the highest and most absolutely privileged communications. The claim of privilege can, therefore, be settled only by a jury." 24 Wend. at 442.

In Sullivan v. Daily Mirror, Inc., 232 App. Div. 507 (1st Dept. 1931) remarks made of one sports writer by another were held to be libel per se. In Hoeppner v. Dunkirk Printing Co. (Case No. 1) 227 App. Div. 130 (4th Dept. 1929), aff. 254 N.Y. 95 (1930), the complaint charged that a newspaper article was false and exceeded fair and just discussion of the merit, character and quality of plaintiff's ability as a football coach. The court held this would constitute libel per se as injuring plaintiff in his profession of teacher and athletic coach, because it could not "but harm and damage him in his profession." 227 App. Div. 135. It "practically charge[s] him with incompetency as a football coach." ibid.

See also Kleeberg v. Sipser, 265 N.Y. 87 (1934) and Holm v. Holm, 146 A.D. 75, 130 N.Y.S. 670 (1st Dept. 1911), which relied on the Triggs case. In Carroll v. Paramount Pictures, Inc., 3 F.R.D. 95 (S.D.N.Y. 1942) the court relied on Ben-Oliel in denying defendant's motion to dismiss plaintiff's second cause of action, which alleged libel per se upon the plaintiff, a well-known and competent producer, in falsely imputing to him the authorship of a certain motion picture.

POINT II

Fair Comment and Constitutional Privilege Have No Place in This Case

Fair comment and constitutional privilege cannot protect the defendants from liability for their defamations of the plaintiff. In the first place, Jeffers' broadcast purported to state the facts, not opinions, both as to the content of plaintiff's book and as to plaintiff's being guilty of hypocrisy. Beyond this, the broadcast was the product of a conspiracy formed for the specific purpose of attacking the plaintiff, and even comment is not fair nor privileged if it is made solely for the purpose of causing harm. Restatement of Torts §606 (1)(c). Even apart from the conspiracy, Jeffers would enjoy no constitutional privilege for misstatement of fact. He had bought the book a month or two before the review and had read it at that time (D 121 pp84-85). There was no "hot" or spot news value to the "review." In the parlance of WINS it was "soft material," not news at all (D 117 pl1:14). Jeffers had every opportunity to read the book and make sure that he had the facts correctly.

The same principles apply to Martin's treatment of the "review." Its only motive for printing it was to attack the plaintiff in order to aid its zoning application. Both Martin's president, Berger, and its vice president, Lloyd, had as noted above read the book well in advance of the printing of the leaflet (A-44; D 114 pl4:6ff.). The "Ms. Guitar Quotes" were fabricated out of whole cloth as purported statements of fact solely for the purpose of attacking the plaintiff.

In Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel

Publishers, Inc., 260 N.Y. 106, 118 (1932), The New York Court of Appeals defined fair comment as follows:

"A comment is fair when it is based on facts truly stated and free from imputations of corrupt or dishonorable motives on the part of the person whose conduct is criticized, and is an honest expression of the writer's real opinion or belief."

This definition is in every respect applicable to the present case. The gravamen of this action is that the facts are not truly stated; the plaintiff is charged with "hypocrisy" assuredly a dishonorable motive, and given the backgrounds of the publications, there is no basis for finding that what was said was "an honest expression." With the plaintiff's book before them, neither Jeffers nor Berger had any basis for misstating its content. The so-called "quotes" do not find a basis in the writings on which Berger said they were based. The purpose of both "review" and "quotes" was "solely for the purpose of causing harm to" the plaintiff and thus not within fair comment. Restatement of Torts §606 (1)(c).

In granting summary judgment, the district court held that the plaintiff "is a 'public figure' within the meaning of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)" and that she "has presented no evidence giving rise to an issue of fact as to whether malice actually existed." (A-331).

In the first place the court below has overlooked the fact that the plaintiff is a public figure for the purposes of Jeffers' broadcast only if it is conceded that the broadcast was intentionally directed by Jeffers at the plaintiff's appearance before the December 13, 1972 meeting at the Irvington High School. No case thus far has found a writer to be a "public

figure" merely by virtue of her being a writer. Any contention that the plaintiff was a public figure in the eyes of Jeffers or WINS is disposed of by statements of Dickey, General Manager of WINS, who drew a sharp distinction between news and "soft material" such as Jeffers' "review" (D 117 pl1:14). Dickey further stated:

" * * * This is a book review. It is not a controversial issue of public importance."
(D 118 p20:21).

The most recent statement of the Supreme Court on the latitude constitutionally allowed in publications concerning public figures is Cantrell v. Forest City Publishing Co., 419 U.S.245, 42L.Ed.2d 419 (1974). In that case it was stated that

" * * * The definition of 'actual malice' established by this Court in New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) 'with knowledge that [a defamatory statement] [brackets in original] was false or with reckless disregard of whether it was false or not.' As so defined, of course, 'actual malice' is a term of art, created to provide a convenient shorthand for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers." 42 L.Ed.2d at 426

In no respect does Martin's publication of its leaflet meet the New York Times standard. The leaflet was not concerned in any way with the plaintiff as a public official, nor was Martin a publisher within the meaning of any of the cases that have applied and developed the New York Times standard. Within the meaning of Restatement of Torts §606 (1)(c) Martin distributed the leaflet "solely for the purpose of causing harm to" the plaintiff in order to advance its own interests. Finally, even if it were incumbent upon the plaintiff to establish "actual malice," there is abundant proof of Martin's knowledge of falsity.

Berger and Lloyd had read the plaintiff's book long before the leaflet was printed, and Berger has been unable to establish any bona fide relationship between the "Ms. Guitlar Quotes" and the materials on which he says they were based.

The Martin leaflet was distributed "solely for the purpose of causing harm"* to the plaintiff by defaming and disparaging her in the eyes of those who opposed Martin's \$75 million Tarrygreen project. The leaflet was part of a "package" of promotional material that Martin distributed to the audience at the December 20, 1972 zoning hearing (D 116 p56-58; D 123 p26). As such, it was purely commercial advertising and not within the constitutional protection of freedom of the press. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

POINT III.

There is No Basis in the Record for Granting Defendants Summary Judgment

It has long been established law that to accuse one falsely of hypocrisy is libel per se. Levey v. Brooklyn Union Publishing Co., 65 Misc. 373 (S.Ct. N.Y. Spec. Term 1909), affd. without opinion 137 App. Div. 947 (1st Dept. 1910); 202 N.Y. 555 (1911); Thorley v. Lord Kerry, 4 Taunt. 355; McKee v. Robert, 197 App. Div. 842 (3rd Dept. 1921); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58 (1920). As noted above (pp37-38) the court below has without explanation or quotation of authority adopted the view that " 'hypocrisy' is a comment referring to the book's content; it is not aimed personally at plaintiff." (A-314, f.n.5). As this brief has shown, hypocrisy is a purely human quality or

*Restatement of Torts §606 (1)(c).

attribute inseparably related to belief, which is a state of mind or thought. If there is any issue of fact on the matter of libel per se in the defendants' charge of "hypocrisy," it is only the one created by the court below in newly defining that word, making it a disembodied term that can apply to a book without applying to its author.

To repeat, in accusing the plaintiff of hypocrisy, the defendants committed libel per se, and on that ground alone it was error to grant them summary judgment.

Beyond that, however, this is a jury case in which the plaintiff charges that the Jeffers broadcast was the product of a conspiracy involving Martin, Broadcasting, their "double agent" Yottes, and Jeffers. The defendants have met the plaintiff's enumeration of all the circumstances that establish the conspiracy and its result with their own precisely spelled out story, beginning with Yottes' allegedly hearing the Jeffers broadcast by pure chance. Then, defendants say, Yottes was told by Berger to tape the rebroadcast, which he says he did, typed out a transcript and gave it to Berger.

For this account the defendants have offered no corroboration of any sort. It rests entirely on the testimony of the defendants Berger and Yottes, which has been shown to be contradictory and inconsistent at many points with other testimony offered by the defendants, most glaringly and with the utmost materiality in respect of the irreconcilable conflict between Berger's testimony on his disposition of the alleged Yottes transcript and that of his own secretary, Migliore, and partner, Weinberg (pp24-26, supra). In order to grant summary judgment,

the court below had to assign full credibility selectively to the testimony of Berger and Yottes, while ignoring all the conflicts with their testimony.

In Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620 (1944), where the court reversed a grant of summary judgment, it was held,

" '* * *If the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony.' Spring Co. v. Edgar, 99 U.S. 645, 658 (1878)" '* * * " 'The jury, even if such testimony be uncontradicted, may exercise their independent judgment.' The Conqueror, 166 U.S. 110 (1896) * * * " 321 U.S. at 627-628.

The court went on with language that is particularly apposite to the Berger/Yottes testimony:

" 'The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.' Sonnentheil v. Christian Moerlein Brewing Co. 172 U.S. 401, 408 (1898)" 321 U.S. at 628.

Particularly applicable to the present case is the holding of the Court in Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962):

"We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

To the same effect see White Motor Company v. United States, 372 U.S. 253, 259 (1963), quoting Poller. Although this case is not antitrust litigation, it is a complex factual case "where motive and intent play leading roles" and "the proof is largely in the hands of the alleged conspirators." Adickes v. S. H. Kress and

-Company, 398 U.S. 144 (1970) has many parallels to the present case. There the plaintiff brought suit for deprivation of her civil rights, charging in the second count of her complaint a conspiracy between the defendant and the police. 398 U.S. 148. The defendant argued that there were no facts to show a conspiracy, to which the plaintiff argued:

" * * * That although she had no knowledge of an agreement between Kress and the police, the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the noncircumstantial evidence of the conspiracy could only come from adverse witnesses."

* * *

"As the moving party, respondent [Kress] had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." (Emphasis added) 398 U.S. at 157.

In the present case the defendants have endeavored to show the absence of a genuine issue as to any material fact by the Berger/Yottes account of the latter's alleged transcript of the Jeffers broadcast. Even if a writing purporting to be that transcript were produced, it would be subject to severe challenge that could be resolved only by evaluating the credibility of the live testimony of Berger and Yottes. However, no such transcript has been produced; Berger's testimony on the matter has been contradicted by his two closest associates; and the credibility of his testimony and that of Yottes is open to question in numerous other respects (e.g., pp20, 23-24, 28, supra). The most that the testimony of Berger and Yottes can do is to confirm plaintiff's charge that Martin used Yottes as its instrumentality for

procuring a WINS "review" for its leaflet.

There is little likelihood that plaintiff will ever uncover direct evidence of the details of the transaction for it is inherent in a conspiracy that it is secret. As the New York Court of Appeals said in Keviczky v. Lorber, 290 N.Y. 297, 302 (1943), a case in which a real estate broker alleged he had been unlawfully deprived of his commission:

"Direct and positive proof of a conspiracy to cheat and defraud such as is here presented is seldom, if ever, attained. Conspiracies of this nature ordinarily are not conceived and executed openly but in secret. Usually the only evidence available is that of disconnected acts on the part of the individual conspirators, which acts, however, when taken together in connection with each other, show the conspiracy to secure a particular result quite as satisfactorily and conclusively as more direct proof."

In accepting the portions of the Yottes and Berger testimony favorable to the defendants and overlooking their inconsistencies and contradictions, the court below has usurped the province of the jury and disregarded an underlying principle that must be applied to any motion for summary judgment.

"If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury." Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969).

Where different inferences may reasonably be drawn from the same evidence, the decision is one for the jury because

". . . [I]t is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'" Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700-701 (1962).

"It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility

of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable." (Citations omitted). Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35 (1943).

"On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." U.S. v. Diebold, Incorporated, 369 U.S. 654, 655 (1962).

As has been abundantly noted above, defendants have never produced the transcript of Jeffers' broadcast that Yottes had allegedly made from his alleged tape transcription of that broadcast. The defendants have, however, produced from their file the typewritten transcripts of the notes allegedly made by Migliore and Lloyd of the December 13 meeting where the plaintiff spoke (A-233-239). The existence and the contents of the alleged transcript are pivotal issues of fact as they go to the heart of the Berger/Yottes story of the source of the leaflet "review." The alleged transcript is of course the "best evidence" of its content. Under the Federal Rules of Evidence, Rule 1002 provides:

"To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by Act of Congress."

The best evidence rule is too familiar to require extensive discussion. As set forth in Richardson on Evidence (10th Ed.) (1973) 579, §570:

"The best evidence rule applies to all kinds of writings which are material to the issue, from an official record or a deed to a private letter or a memorandum on a slip of paper. Whenever it becomes necessary to prove the contents of a document, it must be produced or its absence satisfactorily accounted for." (All other citations omitted).

The sharp issue of fact as to the existence of the alleged transcript has been covered at length above. The defendants' entire theory of coincidental origin of the leaflet hangs on this purported transcript. It presents an issue of material fact that cannot be resolved on the tangled testimony of the defendants.

The cases cited below in granting summary judgment rest on a record far from that in this case (A-332). In Thompson v. Evening Star Newspaper Co., 394 F.2d 774, 777 (D.C. Cir. 1968) cert. denied 393 U.S. 884, the court found:

"Plaintiff filed no counter-affidavits disputing any of the assertions in [the moving] affidavits."

* * *

"Plaintiff, in effect, relied on his pleadings to create an issue of fact. That of course is impermissible under F.R.Civ.P. 56(e)." 394 F.2d at 777.

In Hurley v. Northwest Publications, Inc., 273 F.Supp. 967 (D. Minn. 1967) an action for libel and invasion of privacy, the plaintiff submitted in opposition to defendant's motion for summary judgment only legal memoranda and affidavits "stating simply that none of them had been contacted" by the defendant newspaper prior to its publication of the article complained of. 273 F.Supp. at 974. Again there is no analogy to the present case. Konigsberg v. Time, Inc., 312 F.Supp. 848 (S.D.N.Y. 1970) recited both of the preceding cases for the proposition that the plaintiff who submits no evidence cannot prevail on a motion for summary judgment. In granting summary judgment, the court succinctly noted:

"* * * the plaintiff has submitted no affidavits and specified no evidence which he intends to produce at trial; * * *" 312 F.Supp. at 853.

Trails West, Inc., v. Wolff, 32 N.Y. 2d 207 (1973)

on which the court below relies, presents a striking contrast to the present case. There the court found quite a different situation in regard to the source of the publication from that presented here. The court said:

"All of the evidence before us demonstrates that the defendants relied only upon official governmental sources and reported truthfully the information such sources gave them. This the plaintiffs do not really deny.

* * *

"* * * It would be difficult for [the defendants] to seek a higher authority, let alone have serious doubts of their veracity * * *"
32 N.Y. 2d at 219-220.

In Goldwater v. Ginzburg, 261 F.Supp. 784 (S.D.N.Y. 1966), aff'd, 414 F.2d, 324 (2d Cir. 1969) cert. denied, 396 U.S. 1049 (1970), after quoting from United States v. Diebold, Inc., supra, 369 U.S. 654, 655 (1962), the court went on to say:

"* * * Even if it were felt unlikely that plaintiff would prevail at trial (and no opinion is here expressed one way or the other) we are told:

" 'The fact that the trial court believed it unlikely that the * * * [party opposing the motion] would prevail at trial is insufficient to authorize summary judgment against him.' Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966).

"The issue of actual malice on the part of defendants seems peculiarly inappropriate for disposition by summary judgment because it concerns 'motive, intent, and subjective feelings and reactions.' * * * (citations omitted) The Supreme Court has cautioned against summary judgment 'where motive and intent play leading roles.' " (citations omitted)

* * *

"Moreover, since the question deals with the state of mind of defendants Ginzburg and Boroson, plaintiff ought to be able to have their testimony before the trier of fact in open court on cross-examination.

" '[i]f * * * the court is of the opinion that since the knowledge is in the * * * control of the moving party, who is, of course, an interested party, and that the opposing party may be able to establish his claim * * * if afforded the opportunity to cross-examine the moving party in court, * * * the court may deny the motion for summary judgment.' " (Citations omitted) 261 F.Supp. at 788.

Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir. 1974), reversed a directed verdict for defendant at the close of plaintiffs' case. The Court of Appeals reversed the District Court for passing on credibility and choosing among competing inferences, stating the rule to be followed thus, 492 F.2d at 441:

" * * * We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases."

To the same effect is Alioto v. Cowles Communications, Inc., 519 F.2d 777, 780 (9th Cir. 1975).

POINT IV

Defamation By Conspiracy To Violate Title
47 U.S.C. §§ 317, 501, 502, 503 and 508
Gives Rise To A Civil Cause of Action
Under The Laws Of The United States

A case may "arise under" federal law, even though the claim is created by state law, if the complaint discloses a need for the interpretation of an act of Congress. Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921); see, De Sylva v. Ballentine, 351 U.S. 570, 76 S.Ct. 974 100 L.Ed. 1415 (1956).

§§ 317, 501, 502, 503 and 508 of The Federal Communications Act require interpretation in the context of this case. Ivy Broadcasting v. American Telephone & Telegraph Co., 391 F. 2d 486 (2d Cir. 1968); Felix v. Westinghouse Radio Station, Inc., 186 F.2d 1 (3rd Cir. 1950); Weiss v. Los Angeles Broadcasting Co., Inc., 163 F.2d 313 (9th Cir. 1947); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947) all civil cases involving interpretation of the Federal Communications Act.

Section 317 of 47 U.S.C.A. states in pertinent part:

"All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: . . ." See also 47 C.F.R. §73.119

In addition to the prohibition of § 317, §§ 501, 502, 503 and 508 prescribe criminal penalties for a violation of §317

including fine (\$508, \$501) forfeiture (\$503), and jail (\$501, \$508).

The rationale of the prohibition of §317 and its analogue of severe penalties is set forth in the legislative history of §317, 1960, U.S. Code Congressional and Administrative News, 3523 quoting H. Rept. No. 1258: "Investigation of Regulatory Commission and Agencies," interim report of the Committee on Interstate and Foreign Commerce, Subcommittee on Legislative Oversight 86 Cong. 2d, Feb. 9, 1960 which states:

"Section 317 should be amended to require announcement of payments made not only to licensees but also to any other individuals or companies for advertising 'plugs' on behalf of third parties on sponsored programs. Provision should be made to prohibit payment to any person or company or the receipt by any person or company for the purpose of having included in a broadcast program any material, whether vocal or visual, without having announcement made on the program that the showing or hearing of such material has been paid for. Criminal penalties should be imposed upon any person or company who violates this section as amended." at 3525-6

The subcommittee's recommendation was based on evidence presented at its extensive hearings on television quiz show program "payola" and related improper practices in the broadcast industry. See 1960 U.S. Code Congressional Administrative News at 3526 et. seq.

It is obvious that the amendments to the Communications Act of 1934, above cited, were intended to protect the public from unfair and improper broadcasting practices. It is equally apparent that the amendment was designed to aid those who are personally harmed by these deceptive and unlawful practices.

When parties conspire and combine to discredit and defame another for their own personal gain under the guise of a broadcast of a purported "book review" it is the very harm which Congress sought to protect against, and plaintiff is a member of the class most vulnerable to such abuse.

Mr. Justice Harlan in a concurring opinion in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) stated:

" . . . in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." 403 U.S. at 402.

J. I. Case Co. v. Borak, 377 U.S. 426 (1964), was a suit for damages for false and misleading statements prohibited by the Securities Exchange Act and regulations thereunder, which made no specific provision for a private right of action. In reversing the Seventh Circuit Court of Appeals the Supreme Court held that inasmuch as the Act had among its chief purposes "the protection of investors," it "certainly implies the availability of judicial relief where necessary to achieve that result"; and further said:

"We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. As was said in Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176, 63 S.Ct. 172, 174, 87 L.Ed. 165 (1942):

"'When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.'

" * * * [Citations omitted] It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 777 90 L.Ed. 939 (1946)." (377 U.S. at 433).

The "Federal statute [which] provides the general right to sue," was 28 U.S.C. § 1331 permitting suits of a civil nature where the matter and controversy arises under the Constitution or laws of the United States. (327 U.S. at 683).

In 1940, in Deitrick v. Greaney, 309 U.S. 190, Chief Justice Stone held that while the remedy sought was not provided by the Act there involved, the right of action nevertheless lay:

" . . . it is the federal statute which condemns as unlawful respondent's acts. The extent and nature * * * of this condemnation though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted, see, Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 60 S.Ct. 285, 84 L. Ed. 313 . . ." (309 U.S. at 200-201).

In Tunstall v. Brotherhood, 323 U.S. 210 (1944), plaintiff sought injunction and damages under the Railway Labor Act for color discrimination by the Union. The Act provided no remedy but did prohibit discrimination. The Court said:

"We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of this condemnation though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.'" (Citations omitted) (323 U.S. at 213)

Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir., 1956), involved the question of whether 49 U.S.C. §484, which prohibits discrimination, gave a right of action in the federal courts for alleged violations of that section; it held that the prohibition by implication created a right of action. Circuit Judge Frank stated:

"Section 622(a) makes it a federal crime to violate, inter alia, Section 484(b). The latter section is for the benefit of persons, including passengers, using the facilities of air carriers. Consequently, by implication, its violation creates an actionable civil right for the vindication of which a civil action may be maintained by any such person who has been harmed by the violation. As we said in Reitmeister v. Reitmeister, 2 Cir., 162 F.2d 691, 694: 'Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal.'" (Citations omitted) (229 F.2d at 501)

* * * *

"We think it created a new federal right. Although a right created by a federal statute covers the same ground as a right already existing under the common law of the states and territories, a suit based on that federal statute is one 'arising under' a law of the United States, so that a federal district court has jurisdiction under 28 U.S.C. §1331. See, e. g., Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939; Tunstall v. Brotherhood of Locomotive Firemen &

Enginemen, 323 U.S. 210, 213, 65 S.Ct. 235, 89 L.Ed. 187; Reitmeister v. Reitmeister, 2 Cir., 162 F.2d 691, 694; Note, 48 Col. L.Rev. (1948) 1090. No federal common law of torts exists; when Congress enacts legislation rendering it tortious to do what is already a state common-law tort, a suit based on that legislation is within 28 U.S.C. §1331." (229 F.2d at 501-2.)

The rationale found in the Supreme Court cases above cited was applied to the Federal Communications Act of 1934 in the case of Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir., 1947). In holding that a violation of §605 of the Communications Act of 1934, 47 U.S.C.A. 605 imposed civil as well as criminal liability, the Honorable Learned Hand stated:

"The first questions are whether the Communications Act of 1934, 47 U.S.C.A. §151 et seq., imposes a civil, as well as a criminal liability upon anyone who 'publishes' a telephone message, and whether, if so, the District Court had jurisdiction over the action. Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal." 162 F.2d at 694.

The Reitmeister case, supra, has been cited with approval in Wyandotte Transportation v. United States, 389 U.S. 191 202 (1967) for the proposition that civil liability will be imposed where criminal liability is "inadequate to ensure the full effectiveness of the statute which Congress had intended." See also, Wallis v. Pan-American Petroleum Corporation, 384 U.S. 63 (1966) where Mr. Justice Harlan citing Reitmeister, supra stated:

"If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law." (Citations omitted) 384 U.S. at 68.

The case of United States v. Perma Paving Co., Inc.,

332 F.2d 754 (2d Cir. 1964) dealt with the issue of whether the United States could recover costs it had incurred in dredging from a portion of navigable water a shoal resulting from the misuse of riparian property owned by the city of New York. In holding that such a civil remedy would be implied into a statute expressly authorizing criminal penalties (33 U.S.C. §406), the court by Circuit Judge Friendly stated:

"We see no basis for thinking that the imposition of criminal penalties and the specific authorization of injunctive relief for a particular purpose indicated a Congressional desire to withhold a remedy which in many instances will be more appropriate." 332 F.2d at 758.

The cases cited by the court below as authority for dismissing any right of plaintiff to recover under the Federal Communications Act appear in three instances out of the four to be dicta. In Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942) the Court actually affirmed the grant of a stay against the FCC, and its observation that the Act gave no private right of action played no part in the outcome of the case. In Gordon v. National Broadcasting Company, 287 F.Supp. 452 (S.D.N.Y. 1968), it was held that the plaintiff lacked standing to sue because he asserted injury to the United States as a whole rather than to himself. 287 F.Supp. at 454. Ackerman v. Columbia Broadcasting System, Inc., 301 F.Supp. 628 (S.D.N.Y. 1969) was, like Gordon, an "equal time" case. Although the case held that the plaintiffs had no private right of action under the equal time provisions of the Federal Communications Act, the court significantly pointed out that the case should be dismissed because of the absence of the required jurisdictional amount and that there was no "case or controversy" because the plaintiffs in effect were seeking "an

advisory opinion on a hypothetical issue." 301 F.Supp. at 634. Only in Daly v. West Central Broadcasting Company, 201 F.Supp. 238 (S.D. Ill. 1962) did the court squarely face the issue of a right of action for "equal time" under the Federal Communications Act, and that case expressly recognized that its decision was at odds with that of the Ninth Circuit (201 F.Supp. at 241) in Weiss v. Los Angeles Broadcasting Co., Inc., supra, 163 F.2d 313 (1947).

Violation of §317 of the Communications Act of 1934 (47 U.S.C. §317) was an essential element of the Martin-Yottes-Jeffers scheme to defame the plaintiff. Had the provisions of law been observed and the true commercial origin of the broadcast been disclosed, doubtlessly there would have been no broadcast and no leaflet. The imposition of civil liability under the statute would have a salutary and beneficial purpose in effectuating the objective of the statute under the facts of this case. It would instill in the owners of broadcasting stations a sense of responsibility under the statute rather than to permit them to issue letters of marque to their personnel as WINS did here when it gave Jeffers complete carte blanche in his programming, thereby enabling him to attack anybody and everywhere as he pleased without higher responsibility or accountability (D 117 pp11:23-15:25, 18:6). In giving Jeffers this complete latitude, Broadcasting did not "exercise reasonable diligence" as required by §317(c) to assure compliance with the statute.

Indeed Broadcasting's practice as manifested in the case of Jeffers was precisely what was condemned many years ago by the Supreme Court of California in the case of newspapers in

Davis v. Hearst, 160 Cal. 143 116 P. 530 (1911):

"* * * where the policy and conduct of a newspaper show that its proprietor has given his subordinates carte blanche to do anything and everything that will make the paper a financial success * * * is implied a willingness of the proprietor to publish libels against anybody * * *"
116 Pat 540.

The civil liability of broadcasters under Section 317 could go far to assure private persons freedom from paid personal attack as occurred in this case because of the failure of Broadcasting even to attempt to exercise any control over what Jeffers broadcast.

C O N C L U S I O N

On all of the foregoing, the decision appealed from should be reversed and the case remanded to the United States District Court for trial.

Respectfully submitted,

WINDELS & MARX
51 West 51 Street
New York, New York 10019
212 977 9600

ROBERT P. KNAPP, JR.
J. DENNIS McGRATH
Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

VINCENT PANZA, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 2802 ELLIS AVE
BRONX, N.Y.

That on the 20th day of OCTOBER, 1975,
deponent personally served the within BRIEF OF PLAINTIFF APPELLANT
MARY ANNE GILITAR
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

By depositing 2 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

TOWLEY UDDIKE CARTER + ROGERS
ATTORNEYS FOR DEFENDANTS APPELLES WESTINGHOUSE ELECTRIC,
WESTINGHOUSE BROADCASTING + H. PAUL JEFFERS
220 EAST 42ND ST. NEW YORK, N.Y. 10007

WILLIAM F. LARKIN, ESQ.
ATTORNEY FOR DEFENDANTS APPELLES ROBERT MARTIN CORP.
WEINBERG + BERGER
11 PARK PLACE NEW YORK, N.Y. 10007

F. V. MINA, ESQ.
ATTORNEY FOR DEFENDANTS APPELLES
SCHNEIDER + LLOYD
217 BROADWAY NEW YORK, N.Y. 10007

Vincent Panza

Sworn to before me this

20th day of October, 1975

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-030908
Qualified in Bronx County
Commission Expires March 30, 1978

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Isa Perle, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 61 44 11th Avenue, Apt. 10, New York, N.Y.

That on the 20 day of OCTOBER, 1975,
deponent personally served the within BRIEF OF DEFENSE WILLIAM
MARY ANNE GUTER
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

CERCHIARA + CERCHIARA
ATTORNEY FOR DEFENDANT-APPELLEE YOTTES
145 MOUNT VERNON AVE.
MOUNT VERNON, N.Y. 10550

Sworn to before me this

20th day of October, 1975

JMR

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-011113
Qualified in Bronx County
Commission Expires March 30, 1976

